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Supreme Court, U.S.
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No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ANNA PENK, ET AL, Petitioners,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July 28, 1987

VOLUME I

QUESTIONS PRESENTED

1. After recognizing "historical disparity" in the pay, promotion, and tenure of women and men faculty, whether the Ninth Circuit failed to follow Bazemore by concluding that there was no violation of Title VII unless defendant intentionally failed to remedy the disparity.

2. Whether the Ninth Circuit failed to follow Teamsters, Burdine, Aikens, and Bazemore by concluding that defendant has no burden to provide evidence of the reason for the proven disparity?

3. Whether the Ninth Circuit failed to follow Bazemore by not recognizing that less than all measurable variables may serve to prove plaintiffs' case.

4. Whether the Ninth Circuit failed to follow Burdine by not affording

plaintiffs a full and fair opportunity to demonstrate pretext.

5. Whether the Ninth Circuit violated the intent of Congress by not holding academic employers to the same standard as other employers.

LIST OF PARTIES

The parties to the proceedings below were the petitioners Anna Penk, et al, on behalf of a class of faculty women as variously defined by the District Court, and their employer, the Oregon State Board of Higher Education.[1]

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[1]The names of the other plaintiffs are Elaine Spencer, Bernice Gilmore, Madronna Holden, Betty Leonard, Lois Schreiner, G. Joanne Amspoker, Margaret Lumpkin, Mary H. Davison, Rosemary Dunn Dalton, Sherry McLeod Mihel, Polly Ann Fisher, Lorraine B. Furby, Ann L. Hoffstetter, Margaret A. Huntley, Dianna L. Kale, Mary Ann Petry, Carol E. Rathe, Jane M. Siegel, Barbara J. Stewart, Ruth Waugh, Michele Wollert, all petitioners herein except Sherry McLeod Mihel who did not participate in the appeal to the Ninth Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES

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ANNA PENK, ET AL, Petitioner,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Anna Penk, et al, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on April 29, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is

reported at 816 F.2d 458, and is reprinted in the Appendix hereto, Volume I, p. 1 - 42, infra.

The opinion of the United States District Court for the District of Oregon is partially reported at 36 C.C.H. Employment Practices Par. 35,049, and is reprinted in the Appendix hereto, Volumes II and III of this Petition, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. Sec. 2000e-5(f)(3), which is reprinted in the Appendix hereto, Volume I, p. 44, petitioners brought this suit in the District of Oregon on April 25, 1980. The class was certified on October 13, 1981. Judgment was entered on March 29, 1985 granting relief to three individual plaintiffs and dismissing the other individual cases and the class claim.

On petitioners' appeal, the Ninth Circuit entered a judgment and opinion affirming the District Court on April 29, 1987. No petition for rehearing was sought.

Plaintiffs seek attorneys' fees on appeal pursuant to 42 U.S.C. 2000e-5(k), which is reprinted in the Appendix hereto, Volume 1, p. 44, of this Petition.

The jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

28 U.S.C. 42, Sec. 2000e-2, which is reprinted in the Appendix hereto, Volume I, p. 43, infra; Chapter 351 of Oregon Revised Statutes, which is reprinted in the Appendix hereto, Volume I, p. 45 - 76 of this Petition.

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STATEMENT OF THE CASE.

1. Summary

Penk v. Oregon State Board of Higher Education was brought by twenty-two women faculty members on behalf of themselves and approximately 2,000 other women faculty within the state system. The Board has the duty to govern higher education throughout the State of Oregon. Or. Rev. Stat. Ch. 351. It supervises eight colleges and universities.

In this action, plaintiffs alleged that the Board discriminated against them individually because of their sex, in violation of Title VII, 42 U.S.C. Sec. 2000e-2(a). They sought money damages on their individual claims. Plaintiffs also alleged that the Board engaged in a pattern or practice of sex discrimination against women faculty members as a class, and on this basis sought class-wide money

damages and injunctive relief (CR 256).

Specifically, plaintiffs asserted in their individual and class cases that, because of their sex, they have been discriminated against in pay, rank, tenure, and administrative appointments. The individual plaintiffs, in addition, claimed discrimination in matters of staff support, office space, sabbatical leave, and related employment issues (CR 256).

This action was filed on April 25, 1980 (CR 1). The class was certified on October 13, 1981, but was not fully defined until December 10, 1982 (CR 99; 241). Trial commenced on February 8, 1984 (CR 490). Plaintiffs' last witness testified on May 2, 1984, and plaintiffs rested on May 29, 1984 (CR 555); defendant then filed a motion to dismiss the individual and class claims for

failure to prove a prima facie case and a motion to decertify the class (CR 563). On August 10, 1984, the court denied the motions to dismiss. The court did, however, limit the class to "regular teaching faculty" (CR 609).

Defendant's first witness testified on May 23, 1984, and its case continued through October 22, 1984 (CR 666). Plaintiffs were then allowed to present approximately five days of rebuttal evidence (CR 670-73). Thereafter, defendant's statistical experts testified, on October 29 through November 8, after which plaintiffs presented approximately one and one half days of additional rebuttal testimony (CR 673a & b; 679a; 681; 681a; 682; 682b; 682c; 682d; 687a). Two of plaintiffs' key rebuttal experts, however, were prevented from testifying (CR 641; 668).

Defendant's expert was the final witness on November 9, 1984 (CR 687a). The court heard closing argument on November 20, 1984 (CR 696).

On February 13, 1985, the court rendered its decision: three of the named plaintiffs had proved intentional discrimination on the basis of sex; defendant prevailed on all other claims (CR 716).

Evidence produced both by plaintiffs and defendant demonstrated disparities in pay, rank and tenure at all eight institutions. Since neither the District Court nor the Ninth Circuit made specific findings about the extent of the disparity between men and women, it is necessary to present in summary form the statistical evidence introduced by both parties.

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2. Plaintiffs' statistical evidence established unexplained disparities on the basis of sex at every institution in every year studied in pay, rank, and tenure decisions.

a. Salary Studies.

(i) Gross salary averages.

Plaintiffs introduced statistical evidence of the average salaries earned by men and women for each year and each institution in the Oregon State System of Higher Education (Pl. Ex. 1, Tables 1-9). A typical value is seen in 1979-80, the year that this lawsuit was filed; the women faculty in the Oregon State System of Higher Education were paid on the average thirty percent less than the men faculty (TR 1705).

(ii) Multiple regression analysis of salary.

To account for differences in education and experience levels of men and women, and for overall salary

differences due to the higher proportions of men in more well-paid disciplines, plaintiffs also conducted multiple regression analyses of salary (Pl. Ex. 1, pp 7-8). In these studies, variables representing education, experience, and discipline were used to determine how well they actually predicted salary in the Oregon system.[2] These studies showed approximately a ten percent difference in the salaries paid men and women even when these men and women had the same

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[2]The "predictor" variables used in plaintiffs' studies to represent education, experience and discipline were: 1) highest degree, 2) whether degree was obtained after hire, 3) years since receipt of highest degree, 4) years of service to the institution, 5) age at time of hire, 6) discipline. Variables 7) ethnicity, and 8) citizenship were in the data base and were not removed but did not have a significant impact. (Pl. Ex. 1, p. 7-8). Plaintiffs did not include rank since it is under the control of the institution and not an independent variable. (Pl. ex. 2782, p. 16).

the same education and experience and worked within the same discipline (Pl. Ex. 2, Table A11). These differences were highly statistically significant (approximately 12-16 standard deviations) (Pl. Ex. 2, Table A11).[3]

The redefinition of the class on August 10, 1984, eliminated all administrators, research assistants and associates, extension agents, librarians and most instructors (CR 609). New studies showed that the average difference in salaries between men and women within the newly defined class was approximately eight percent; this

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[3]Statistical significance is a way of determining mathematically the point at which it is likely that the observed differences are not due to chance variation, but result from true underlying disparities. Plaintiffs used and the District Court accepted two or more standard deviations as a definition of statistical significance. (Cr. 716, p. 422).

difference, still statistically significant (11 standard deviations), represented an approximate $2,000 annual difference in pay for a nine month salary of $25,000 (Pl. Ex. 2782, Table 2, p. 26).

b. Rank and Tenure.

(i) Cross-tabulation studies of rank and tenure.

Plaintiffs' study on rank and tenure status demonstrated a statistically significant difference between men and women, with the women clustered in the lower ranks and in fixed term appointments (Pl. Ex. 1, Tables 22-84; 104-166).

(ii) Linear discriminant function classification analysis of rank and tenure.

This cumbersome term defines a study which used the salary analysis variables to predict what the rank and tenure

status of each woman would be if she were placed according to her qualifications in the same way that the men were placed (Pl. Ex. 1, p. 15). There were forty-four percent fewer women full professors and about forty percent more women instructors than their qualifications would suggest. (Pl. Ex. 1, Figure 3). Similarly, there were fifteen percent fewer tenured women and about eight percent more women on fixed term appointments than were predicted (Pl. Ex. 1, Figure 6). Again, the results were highly statistically significant for both rank and tenure.

(iii). Ordered logistic regression analysis of rank and tenure.

In summary, these studies on the newly defined class showed the odds of a woman being in the lowest rank, that of instructor, rather than higher, are two

and one-half times that of a man with the same qualifications (Pl. Ex. 2782, p. 30, corrected [RT 22480]). The odds of being an assistant professor, rather than higher, were over two times the odds of her male counterpart. (Pl. Ex. 2782, p. 30, corrected [RT 22849]). The odds of being an associate rather than a full professor were over three times those of a man (Pl. Ex. 2782, p. 30, corrected [RT 22480]), differences which were once again statistically significant (3.7-4.9 standard deviations) (Pl. Ex. 2782-C, Table 4, corrected).

3. **All of defendant's statistical evidence showed unexplained disparities.**

a. Salary studies.

Salary regression analysis results were reported for each institution and year separately; results, however, were not aggregated over the entire state

system even though the class as certified was for the entire state system.[4] (D. Ex. 8186, Tables 24-33). Failure to aggregate means smaller samples, and this tends to produce smaller standard deviations. (Pl. ex. 2782, p. 121) Defendant added the variable of rank, a variable which is not independent of university control, claiming that rank is an unbiased measure of productivity. (D. ex. 8186, p. 34)[5] Still, of the fifty-nine sex coefficients (wage gaps) reported, fifty-three were negative (disfavor women) and nineteen of them

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[4] Defendant had earlier unsuccessfully argued that a separate class was preferable for each institution.

[5] The actual predictor variables used were degree, years at institution, years since receipt of degree and whether degree was received after hire, all differentiated by whether the degree was "terminal" or not; rank, time in rank, and discipline (D. Ex. 8186, p. 27).

were statistically significant at the 2-standard deviation level. The negative coefficients generally fell in the two percent to five percent range.

Where significant disparities were found, defendant repeated its analysis, first removing all faculty members who were two standard deviations above or below the regression line (about five percent of the faculty) (D. Ex. 8186, Tables 34-39). These persons excluded from the analysis were called "outliers," and included mostly high paid men and low paid women. (Pl. Ex. 2782, pp. 117-118) Still, all nineteen of the sex coefficients resulting from those reduced data sets remained negative and twelve remained significant at the two-standard deviation level (D. Ex. 8186, Tables 34-40A).

Salary regression studies were also

presented for each department in the system having faculty of both sexes. The specific coefficients themselves were not reported, only whether they were negative or positive. Approximately two-thirds of the coefficients were negative (D. Ex. 8186, Table 41).

b. Cross-tabulation studies of tenure.

Defendant presented a cross-tabulation, by sex, of tenure decisions from 1978 to 1982 for each institution (D. Ex. 8186, Table 3; RT 22733). These tables, considered together, showed that tenure was denied to twenty percent of the men and twenty-five percent of the women who requested it. The tenure status of new hires from 1978 to 1983 was cross-tabulated by sex and institution, and showed that twenty-four percent of men and twelve percent of the women were

placed in tenure track rather than in fixed term positions (D. Ex. 8186, Table 4).

c. Promotion studies.

Defendant also introduced studies which showed, by sex, the number and outcome of requests for promotion to full, associate and assistant professor from 1978 to 1982 for each institution (D. Ex. 8186, Table 9, 12-14). The studies reflect that the men were more successful in becoming full professors and associate professors while the women were more likely to become assistant professors. The women spent more years in rank.

d. Current rank studies.

Comparisons were presented for instructor versus higher rank for persons without "terminal" degrees and for assistant professor versus higher ranks

for persons with "terminal" degrees (D. Ex. 8186, Tables 60m 61). All five of the coefficients reported were negative, and two bordered on significance at the 2-standard deviation level. Defendant studied but did not include in its report the comparison between associate professor and full professor which showed statistically significant differences favoring men (RT 23227-23242; 23255-23259).

4. Common pattern in statistical studies.

Plaintiffs' and defendant's studies differed in precise results, primarily because of defendant's failure to aggregate over the entire class and defendant's use of rank as a predictor variable for salary. The studies done by both parties, however, demonstrated disparities in pay, rank, and tenure

status between men and women of the same education, experience, and discipline. Neither party studied quality of teaching, scholarship, and service. The data necessary for such a study was non-existent.

5. In summary, plaintiffs' non-statistical evidence showed the ultimate control of the Board over the institutions, the predominance of male administrators in the Oregon system, the presence of sexist attitudes among Board members and administrators, disregard of affirmative action goals, and unequal treatment of women.

Twenty-two plaintiffs and sixty-eight other individuals, mostly class members, testified on behalf of plaintiffs. The exhibits were numerous and among other evidence, were the depositions of the present and former chancellor, two Board members, eight institution presidents and seven affirmative action officers.

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6. Defendant offered a variety of explanations for the disparities.

Witnesses for the Board presented potential explanations for the disparity in pay, rank, and tenure status between individual plaintiffs or class members and their male comparators. These included budget (RT 13331), failure to negotiate harder (RT 13331), longevity (RT 14421-23), market conditions (RT 21822), lesser teaching ability (RT 13034), less research (D. Ex. 8099), less institutional or community service (Pl. Ex. 2694), lesser demand for specialty (RT 17815), inflation (RT 11641), and lack of money (RT 12375).

Other representative explanations were that the woman received her education within the Oregon system (RT 4113-14), she knew of the lesser pay or status when she accepted the position (RT

19708), her program was not needed (RT 13090), she was not "laid back" enough (RT 6359), she was too "quiet" (Pl. Ex. 2003M); or, finally, the dean was too swamped to consider the equity raise (RT 2654).

7. **The District Court opinion.**

The 487 page District Court Opinion separately analyzed the twenty-two individual cases without reference to any other evidence in the case and found intentional discrimination in three cases. Although the District Court indicated that it considered all the evidence in the case, nowhere in its 487 page Opinion did it discuss the testimony of the sixty-eight additional class members or other witnesses who testified about individual acts of discrimination and discriminatory attitudes. In fact, the court stated that it "need not

address" this evidence (CR 716, p. 487).

The District Court, after excluding plaintiffs' rebuttal statistical experts, found defendant's statistical experts more credible. (CR 716, p. 374-375). Although plaintiffs survived the Rule 41 Motion to Dismiss, the District Court found numerous flaws in plaintiffs' proof, especially that plaintiffs failed to compare statistically the quality of teaching, scholarship, and service of men and women faculty members. (Cr. 716, p. 385-387) Nor did defendant study these quality factors. No data existed, however, for such comparison. The class case was dismissed.

8. **The Ninth Circuit Opinion.**

The eight page opinion of the Ninth Circuit states, "There is no substantial dispute that historical disparity exists," 816 F.2d at 461, and that the

"statistics may have proved that there were disparities in salaries and other terms of employment, but not that they were the product of disparate treatment." 816 F.2d at 468. The court added, "We can conceive of no useful purpose in detailed rehearsal of the evidence." 816 F.2d at 461. None of the statistical evidence is discussed in the short Ninth Circuit opinion. The court did, however, affirm the District Court's conclusion that the plaintiffs could not prevail without accounting statistically for quality of teaching, scholarship, and service. 816 F.2d at 465. In a footnote, the Ninth Circuit says that the District Court had a "possibly erroneous belief" that faculty rank was "an objective piece of data" and thus could legitimately be used to explain a disparity, but concluded that this "does not appear to

have affected the outcome of the trial." 816 F.2d at 465 n. 2.

The Ninth Circuit found that the District Court's rejection of plaintiffs' statistical case was not clearly erroneous and held the protested trial rulings were not an abuse of discretion.

REASONS FOR GRANTING THE WRIT.

I.

Introduction

The decision of the Ninth Circuit is in fundamental conflict with four major cases of this court that analyze Title VII of the Civil Rights Act: Teamsters, 431 U.S. 324 (1977), Burdine, 450 U.S. 248 (1981), Aikens, 460 U.S. 711 (1983) and Bazemore, 106 S. Ct. 3000 (1986).

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II.

After recognizing "historical disparity" in the pay, promotion and tenure of women and men faculty, the Ninth Circuit failed to follow Bazemore by concluding that there was no violation of Title VII unless defendant intentionally failed to remedy the disparity.

When Congress included higher education within Title VII of the Civil Rights Act in 1972, it made this finding:

> "Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. . . . When they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than their male counterparts. H.R. Rep. No. 238, 92d Cong. 2d Sess. (1971), reprinted in (1972) U.S. Code Cong. & Admin. News 2137, 2155. (Excerpted in the Appendix hereto, Volume I, p. 77 - 78.

The reason why Congress passed the 1972 amendments can also be found in the uncontradicted evidence in this case

through the testimony of Dr. Mary Francis Berry, who was the Assistant Secretary of Education (RT 6717-22).

In this case, the decision of the Ninth Circuit, which recognizes this historic disparity, again raises the issue of whether there is a legal duty to correct preexisting discrimination. This issue has been decided in Bazemore and the Ninth Circuit fails to follow the decision of this Court.

The pay difference shown by plaintiff's statistical proof, even after removing the non-regular teaching faculty, was about $2,000 per year in favor of men throughout all institutions in the Oregon state system and in all of the six years studied, with statistically significant standard deviations system wide of 8.81 to 11.94 (Pl. ex. 2782, p. 26). The defendant's figures, even after

including tainted subjective variables such as rank and removing "outliers", shows a standard deviation of 5.22 (Pl. ex. 2782, p. 132), or about $700 per year when aggregated system wide. A standard deviation of five means that the probability of the pay differential occurring by chance is about one in a hundred million.[6]

The Ninth Circuit recognizes this "historical disparity" at the start of its opinion, but then states:

> "[The District] Court found that, at worst, the state's efforts to bring its female employees into parity with its male employees has been impeded more by external economic factors than by lack of effort

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[6] By way of comparison, the pay differential which proved discrimination in Bazemore using similar objective variables, was $331 per year, 106 S.Ct. at 3008, with much smaller standard deviations than found in this case. Bazemore v. Friday, 751 F.2d 662, 672-673 (4th Cir. 1984).

by the board to redress historic imbalances." 816 F.2d. at 461.

Again at the end of the opinion, the Ninth Circuit concedes that "the statistics may have proved that there were disparities in salaries and other terms of employment, but not that they were the product of disparate treatment." 816 F.2d at 468. (emphasis added) In other words, the court indicates that intentionally failing to correct the proved disparity between equally qualified men and women is not legally wrong if there is no motive to do wrong. The legal issue, then, is whether "external economic factors" or other similar rationalizations can legally excuse the Board, with its budget of over a billion dollars for each biennium (RT. 8415-8416) from correcting the historic disparity. The answer is found in

Bazemore v. Friday, supra, where this court states,

> "Title VII does not excuse perpetuating that discrimination after the Extension Service became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks. . . . Each week's pay check that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII regardless of the fact that this pattern was begun prior to the effective date of Title VII . . ." (emphasis added) 106 S. Ct. at 3008.[7]

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[7]The First Circuit also disagrees with the Ninth Circuit in an academic case:

"Similarly, a decision to hire an individual at a discriminatorily low salary can, upon payment of each subsequent pay check, continue to violate the employee's rights." Lamphere v. Brown Univ., 685 F. 2d 743, 747 (1st Cir. 1982).

In Trout v. Lehman, 517 F. Supp. 873, (D.D.C. 1981), aff'd in part, rev'd in part, 702 F.2d 1094 (D.C. Cir. 1983), vacated 465 U.S. 1056 (1984), the

In the present case, there was no correcting of the disparities between men and women faculty over the six academic years studied, 1977-1978 through 1982-1983. (Pl. ex. 2782, Table 3).

A pay disparity between equally qualified women and men faculty that is not corrected is legally wrong, even when it is "historic". If this were not so, civil rights laws would be ineffective to cause change. The Ninth Circuit decision contradicts this Court's unanimous opinion in Bazemore.

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District Court relied upon Bazemore, in rejecting the defense of historical disparity. (652 F. Supp. 144 (D.D.C. 1986).

III.

The Ninth Circuit failed to follow Teamsters, Burdine, Aikens, and Bazemore by concluding that defendant has no burden to provide evidence of the reason for the proven disparity.

After plaintiffs have proved a prima facie case of disparity, historic or otherwise, then defendant has a burden of explanation through evidence. This court has phrased that burden in different ways. In Teamsters v. U.S., 431 U.S. 324, 360 (1977), this court stated that defendant must introduce evidence "to defeat the prima facie showing of a pattern or practice by demonstrating that [plaintiff's] proof is either inaccurate or insignificant."

In Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981), this Court said that ... "the defendant must clearly set forth, through the introduction of admissable evidence, the

reasons for the plaintiff's rejection" (or, in this case, the reasons for the disparity in pay, promotion, and tenure).

The burden was described in United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-715 (1983) by stating:

> "In other words, the defendant must 'produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason'. Id. (Burdine at 254).
>
> But when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption 'drops from the case' and 'the factual inquiry proceeds to a new level of specificity." (emphasis added).

In Bazemore v. Friday, this Court

shortens this language by saying that defendants "have responded to the plaintiffs' proof by offering evidence of their own," yet clearly this does not suggest any lesser burden for defendant. 106 S. Ct. at 3008. Indeed, this Court in Bazemore criticized the employer's failure to come forward with an explanation by pointing out that:

> "There was very little evidence to show there was in fact no disparity in salary between blacks and whites, or to demonstrate that any disparities that existed were the product of chance. . . . Respondents' strategy at trial was to declare simply that many factors go into making up an individual's salary; they made no attempt that we are aware of - statistical or otherwise - to demonstrate that when these factors were properly organized and accounted for, there was no significant disparity between the salaries of blacks and whites." 106 S. Ct. at 3010 n. 14.

This quoted language from Bazemore,

requiring defendant to show that there was no pay disparity, is an even stricter phrasing of defendant's duty than the language of the previous cases.

In contrast, the Ninth Circuit in the present case quotes Bazemore, and then follows with this sentence:

> "The only relevant burden in a class action disparate treatment case, assuming that plaintiffs can avoid Rule 41 dismissal, is upon plaintiffs to prove the existence of discriminatory intent." 816 F.2d at 461.

Plaintiffs contend a correct statement of the law would be:

> The only relevant burden in a class action disparate treatment case, assuming that plaintiffs can avoid Rule 41 dismissal, and defendant responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, is upon plaintiffs to prove the existence of discriminatory intent (emphasis added).

The Ninth Circuit's statement is not

careless writing. Not only does it not require any burden for the defendant; it also maintains that an error in the allocation of burdens is not reviewable.

> "Indeed, by the time a fully-tried class action disparate treatment case reaches appeal, we need not consider whether the parties carried their respective burdens at the appropriate stages unless prejudicial errors, infecting distinct legal rulings prevented a fair trial." 816 F.2d at 46.

The opinion then erroneously cites Aikens. That case, however, does not support the proposition which denies appellate review of a legal error of the District Court.[8]

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[8]The Ninth Circuit in this case, 816 F.2d at 461, miscites another Ninth Circuit case, Rios v. Board of Regents of the University of Arizona, 811 F.2d 1248, 1249 (9th Cir. 1987). Rios follows Teamsters, Burdine, Aikens, and Bazemore in holding that the presumption of discrimination drops out of the case after defendant has provided evidence of the reason for the disparity. Rios says

The statistical evidence introduced by defendant in this case showed disparity favoring men. Defendant introduced no statistical evidence supporting its claimed major reason for the disparity - quality of teaching, scholarship, and service. Therefore, defendant did not meet its burden as a matter of law.

The McDonnell-Burdine presumption drops out of the case at the stage after defendant has carried its burden of introducing evidence which provides the reason for the disparity.[9] Therefore,

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nothing supporting the view that a legal error misunderstanding the burdens of the parties is never reviewable.

[9] In contrast, the First Circuit, in a recent opinion, recognizes that the defendant has a burden of explanation both where plaintiff has direct proof that discrimination was the motivating factor in defendant's decision and where plaintiff has only proved unexplained disparities. Fields v. Clark Univ., 817

eliminating the presumption and the defendant's evidentiary burden entirely, the Ninth Circuit's decision flies in the face of a decade of Supreme Court opinions including opinions by Justice Stewart (Teamsters), Justice Powell (Burdine), Chief Justice Rehnquist (Aikens), and Justice Brennan (Bazemore).

It is hornbook law that if a presumption operates in plaintiff's favor, then defendant must do something to overcome the presumption. Burdine, 450 U.S. at 255 n. 8. Unless this case is reversed, there will be no such burden upon future defendants in the western states. As this court has pointed out in Transworld Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985), "The shifting burdens of proof set forth in McDonnell-

F. 2d 931, (1st Cir. 1987).

Douglas are designed to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence."

In addition to being contrary to the decisions of this court, defendant having no burden what so ever, also places a nearly impossible burden upon plaintiffs.

Unquestionably, it is difficult to prove the intent to discriminate. Therefore, this court has repeatedly required that defendants not only provide the reason for the disparity, but also support it by evidence. Only then can plaintiffs help the court evaluate whether the given reason is a pretext. But if a defendant can prevail by saying nothing more than its intentions were pure, civil rights plaintiffs have nearly an impossible disadvantage.

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IV.

The Ninth Circuit failed to follow Bazemore by not recognizing that a statistical analysis of less than all measurable variables may serve to prove plaintiffs' case.

The Ninth Circuit opinion tells us that neither side's statistical evidence accurately reflected the complex factors and motivations guiding the Board's employment, salary, and advancement decisions, and therefore the plaintiffs' claim must fail, ever though a prima facie case was established. Statisticians on both sides accounted for the objective variables of education, experience, and discipline, variables which are independent of the control of the institution, and both plaintiffs' and defendant's statisticians found disparity in favor of men. The Ninth Circuit opinion specifically recognizes that statistics may have proved this

disparity. Variables presented in this case are remarkably similar to those used by the Bazemore plaintiffs ("race, education, tenure, and job title") 106 S. Ct. at 3008.

The Ninth Circuit lists the types of rebuttal statistical evidence that this court has expected of defendants in past cases. 816 F.2d at 464. But then the court seeks to break what it apparently believes is new ground by incorrectly relying on a law review article about statistical "goodness of fit."[10] Id.

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[10] T.J. Campbell, 'Regression Analysis in Title VII cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet, 36 Stan. L. Rev 1299, 1305-1322 (1984).

This article argues that a proper regression model must have goodness of fit, which is the statistical concept of R^2, and urges that a R^2 percentage of 50 percent must exist for the study to have validity Id. at 1311. The R^2 found in plaintiffs' multiple regression analysis for all eight institutions over the six

Thus, the Ninth Circuit concludes that plaintiffs' regression could not have a proper goodness of fit because it did not measure "actual decision making" and that this is so since higher education bases its decisions upon such subjective variables as quality of teaching, scholarship and service. It erroneously concludes that a statistical analysis which fails to account for these variables cannot prevail.

a. In this case, there is no data for a statistical evaluation of these variables.

In the present case, the Board maintained no systematic records evaluating these variables and they could not be retroactively created back to 1978 for thousands of faculty members to allow

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years studied averaged 66 percent and the median R^2 was 68.6 percent. (P. ex. 2782, Table 1) Plaintiffs' analysis met Campbell's test.

either side to analyze them statistically. The defendant, despite its speculation that these factors are crucial, has no evidence that quality of teaching, scholarship and service are the reason for the disparity, nor, for that matter, any proof that women are inferior in those categories. Defendant's expert so conceded during the trial (RT 22989). The decisions in Teamsters, Burdine, Aikens, and Bazemore, supra, however, require that defendant provide such evidence of the claimed reason for the disparity in order to meet its burden. Since defendant has not done so, the presumption of discrimination remains in the case. The Ninth Circuit decision, unless reversed, will allow future class defendants to avoid liability by providing no evaluations and maintaining no records!

Plaintiffs have proven historical disparity by using objective variables found in defendant's data base. Comparing women and men faculty members with equal education, experience, and discipline results in an approximately $2,000 per year pay disparity in favor of the men. When defendant and the Ninth Circuit point to these unrecorded, subjective productivity factors as possible explanations of this disparity, this is no more than a speculation that women might be inferior to men as teachers and scholars. This is precisely the same kind of speculation which this Court in Neal v. Delaware, 103 U.S. 370 (1880), rejected by attacking the "violent presumption" that "the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity to sit on

juries." 103 U.S. at 397.

The District Court required that, "In order to prevail, plaintiffs must prove then, even after all relevant qualifications are taken into account, there still remains a [statistically significant] difference." (CR 716, pp. 379-380). (emphasis added) This is further explained by the District Court when it said, "In order to prevail, plaintiffs must present statistical evidence that models the decision making process under study." (CR 716, pp. 380). (emphasis added) This standard requires proving discrimination with scientific certainty. The Ninth Circuit decision affirmed this requirement.

But this "decision making process" is not measurable in this case because there are no systematic evaluations and no records that can be quantified

statistically.

This identical legal error was the basis for the reversal in Bazemore, where this Court said,

> "Importantly, it is clear that a regression analysis that includes less than all measurable variables may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather his or her burden is to prove discrimination by a preponderance of the evidence." 106 S. Ct. at 3009. (emphasis added)[11]

The Ninth Circuit contradicts

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[11] Based upon the Bazemore decision, the Second Circuit reversed and remanded an academic case in which the District Court required too much of the statistical proof. Sobel v. Yeshiva University, 797 F.2d 1478 (2d Cir. 1986). The District Court on remand, maintained its view of the evidence, but recognized that plaintiff need not account for all measurable variables. Sobel v. Yeshiva, 656 F. Supp. 587 (S.D.N.Y. 1987).

Bazemore by requiring plaintiffs to account for unmeasurable variables.

b. Even if such data existed, these variables are inherently biased.

The variables of quality of teaching, scholarship, and service, however, are inherently biased. It makes no legal difference if the predominantly male administrators who paid the women less money rationalized their decisions upon a subjective feeling that the women are perhaps inferior teachers and scholars. If the decision is discriminatory, so is the rationale. It is for these reasons that P. Baldus and J. Cole question the use of such variables:

> "An important consideration in determining the suitability of a qualification variable is the likelihood that it will reflect the very bias that the quantitative analysis is seeking to detect. For example, if efficiency reports

> for workers in an employer's plant are prepared by socially biased supervisors, then one would expect those evaluations to explain statistically the disparities observed in a socially discriminatory salary structure, i.e., workers with good efficiency reports (the whites) are paid better than workers with poor efficiency reports (the blacks). The inclusion of such a variable in a model of the selection process issue would clearly invalidate the results and should therefore be entirely excluded." P. Baldus and J. Cole, Statistical Proof of Discrimination 204 (1980).

This criticism would apply even if the subjective variables had been evaluated.

The District of Columbia Circuit has held that plaintiffs need not account for subjective, unquantifiable variables. Segar v. Smith, 738 F.2d 1249, 1276, (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985).[12]

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[12]The subjective variable in Segar was "specialized experience," which was defined in the applicable civil service

Requiring plaintiffs to use variables that are not measurable in the Oregon State System of Higher Education contradicts Bazemore. Even if they were measurable, the requirement to use these inherently biased variables violates good statistical technique.

IV.

The Ninth Circuit failed to follow Teamsters and Burdine by denying plaintiffs a full and fair opportunity to demonstrate pretext.

The District Court excluded the testimony of plaintiffs' rebuttal experts, Stanford Professors Dr. Kenneth Arrow, Nobel Laureate in Economics and president of the International Economic Association, and Dr. Ingram Olkin, president of the Institute of

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regulations as including "such intangibles as 'ingenuity,' 'resourcefulness,' 'ability to arrive at sound conclusions,' 'tact,' and discretion. 738 F.2d at 1276.

Mathematical Statistics (CR 604, 638, RT 19256, CR 643, CR 649, RT 21512-21515, CR 651m 652, 668); and then decided the case, based in part on the presumed credibility of defendant's experts (CR 716, p. 372, 375). The court said the plaintiffs' original experts were less credible because they were biased, but it would be difficult to accuse Dr. Arrow and Dr. Olkin of being biased.

The district court then required plaintiffs to present most of their rebuttal case, including statistical experts, before completion of defendant's answering case to which the rebuttal was directed (CR 638, 644a, 649b, 670-673, 679a, 681, 681a, 682c, 682d); required plaintiffs to rebut four and a half months of answering testimony in eight days (CR 651; CR 668; RT 21734); changed the class definition over six months into

trial, attempted to clarify it over another month, and then gave plaintiffs an impossibly short three weeks to redo their statistics on the new class (which was never adequately defined) (CR 609, 610, 612; RT 16627-28, 16639, 16698-16704; CR 629; RT 19503). When plaintiffs could not make these last minute deadlines, the District Court excluded part of plaintiffs' newly calculated statistics (the tenure studies) and plaintiffs' internationally known rebuttal statisticians as a sanction. The District Court was anxious to complete this case in order to prepare for another trial. 816 F.2d at 466.

The Ninth Circuit surprisingly found no abuse of discretion.

Since the Ninth Circuit erred by never placing any rebuttal burden upon defendant, it may not have understood the

legal importance of plaintiffs' rebuttal case. The Burdine decision makes clear that plaintiffs must be afforded a full and fair opportunity to demonstrate pretext. Burdine, 450 U.S. at 258. These plaintiffs never had that opportunity.

The denial of a fair trial in ways similar to the conduct of the District Court in this case have caused the Ninth Circuit itself and other circuits to grant new trials.

In Young and Simon, Inc. v. Merritt Savings and Loan, Inc., 672 F.2d 401, 403 (4th Cir. 1981), a reversal was required where prejudice from the combined action of the trial judge was "clearly within the range of possibility," obviously not the test applied by the Ninth Circuit.

The Third Circuit has held that it is an abuse of the trial court's

discretion to exclude the testimony of important witnesses. Meyers v. Pennypack Woods Home Ownership Association, 559 F.2d 894, 905 (3d Cir. 1977). No witnesses could have been more important than internationally known experts such as Dr. Arrow and Dr. Olkin.

Indeed, in connection with the exclusion of Dr. Arrow and Dr. Olkin, the Ninth Circuit found,

> "Obviously, there was a misunderstanding on the part of plaintiffs' counsel. However, as the court noted, he failed to 'memorialize' his understanding. Technically, he violated the court's scheduling orders" (emphasis added) 816 F.2d at 466.

In the case of Potlatch Corp. v. U.S., 619 F.2d 153, 157 (9th Cir. 1982), another panel of the Ninth Circuit held that it was an error to exclude a party's only independent experts. Thus, the District Court's decision to exclude

plaintiffs' rebuttal experts based upon a misunderstanding and technical violation was an abuse of discretion and denied plaintiffs a fair trial.

In Molever v. Levenson, 539 F.2d 996, 1005 (4th Cir. 1976) cert. denied, 429 U.S. 1024 (1976), the court held that the trial judge's curtailment of the trial was an error which required reversal of the verdict. The eight days allowed to plaintiffs in the present case was not a full and fair opportunity to rebut four months of defendant's testimony.

V.

The Ninth Circuit violated the intent of Congress by not holding academic employers to the same standard as other employers.

Institutions of higher learning have sometimes been clothed with a mystique by the courts. Considerable subjectivity

enters into the evaluation of the performance of members of a college faculty. For this reason, these institutions were not included in the Civil Rights Act of 1964. But they were added in 1972, after a finding by Congress that discrimination was present in these ivy-covered halls just as it was elsewhere. H.R. Rep. No. 238, 92d Cong. 2d Sess (1971), supra.

The District Court opinion in this case gave deference to the academic decision makers:

> "Ordinarily, the subjective nature of employment decision-making in most employment situations requires a higher level of judicial scrutiny. However, in academic and professional employment situations, courts should be reluctant to second-guess subjective decisions made by employers or to impose the court's evaluation of the quality or merit of academic and professional employees on defendants." (CR 716, p. 387).

In affirming, the Ninth Circuit also treated academic decision makers differently:

> "This concern [for goodness of fit in statistical models] is particularly important where courts examine academic and professional employment and advancement decisions." 816 F.2d at 464.

Both District and Circuit courts then based their decision upon plaintiffs' inability to model academic decision making statistically.

In Hishon v. King & Spaulding, 467 U.S. 69 (1984), this Court holds that a law firm could not discriminate against a woman lawyer associate in deciding advancement to partnership. In Hishon, Justice Powell, concurring, states:

> "With respect to laws that prevent discrimination, much depends upon the standards by which the courts examine private decisions that are an exercise of the right of

> association. For example, the Court of Appeals generally have acknowledged that respect for academic freedom requires some deference to the judgment of schools and universities as to the qualifications of professors, particularly those considered for tenured positions. Lieberman v. Gant, 630 F.2d 60, 67-68 (CA2 1980); Kunda v. Muhlenberg College, 621 F.2d 532, 547-548 (CA3 1980). CF. University of California Regents v. Bakke, 438 U.S. 265, 311-315 (1978) (opinion of Justice Powell).
>
> "The present case, before us on a motion to dismiss for lack of subject matter jurisdiction, does not present such an issue." (467 U.S. at 80-81, no. 4)

The issue of whether deference to academic decision making is lawful has, therefore, never been directly confronted by this Court, although it has troubled the circuit courts for years.

In Powell v. Syracuse Univ., 580 F.2d 1150, 1154 (2d Cir. 1978), the court found a non-discriminatory termination of

a woman professor, but wrote:

> "The pervasive nature of discriminatory university employment practices has been well documented in the literature, and was characterized in the Congressional debates preceding the passage of the 1972 amendments as 'truly appalling,' 'gross' and 'blatant.'
>
> "It is clear beyond cavil, then, that the Congress has evidenced particular concern for the problem of employment bias in an academic setting. Indeed it might be said that far from taking an anti-interventionist position with respect to the academy, the Congress has instructed us to be particularly sensitive to evidence of academic bias."

Similar concerns are expressed by the First Circuit in Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 175-176 (1st Cir. 1978), vacated on other grounds, 439 U.S. 24 (1978), appeal after remand, 604 F.2d 106 (1st Cir. 1979); and the Third Circuit in Kunda v. Muhlenberg College, 621 F.2d 532, 547 (3d

Cir. 1980).

In Namenwirth v. University of Wisconsin System, 769 F.2d 1235, 1245 (7th Cir. 1985), cert. denied, 106 S. Ct. 807 (1986), the majority opinion highlights the issue:

> "But to say all that is only to face up to the problem. The problem remains: faculty votes should not be permitted to camouflage discrimination, even the unconscious discrimination of well-meaning and established scholars. The courts have struggled with the problem since Title VII was extended to the university, and have found no solution. Because of the way we have described the problem - the decision-maker is also the source of the qualifications- there may be no solution; winning the esteem of one's colleagues is just an essential part of securing tenure. And that seems to mean that in a case of this sort, where it is a matter of comparing qualification against qualification, the plaintiff is bound to lose."

A dissenting opinion of Senior

Circuit Judge Swygert responds,

> "While I commend the majority for its frankness, I dissent from its defeatism. The notion that tenure decisions must be accorded special deference was put to rest in 1972, when Congress expressing concern about widespread discrimination against women in academia, removed academia's exemption from Title VII scrutiny." (769 F.2d at 1244).

Despite the clear expression of congressional intent, most cases that have mentioned deference to academic decision making, especially involving tenure, have ruled against the women or minority plaintiffs. Indeed, courts have deferred more to subjective decision making in white collar jobs than in blue collar jobs. Barthelot, Application of Title VII to Jobs in High Places, 95 Harv.L.Rev. 945, 973-78 (1982).

This Court has never considered whether Title VII applies to academia in

a way different from other employment relationships. For fifteen years, higher education has been subject to Title VII. This case is the proper vehicle for such a review.[13]

CONCLUSION

The Ninth Circuit fails to follow the unanimous decision of this Court in Bazemore, as well as Teamsters, Burdine,

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[13] Additional Circuit court cases in which deference to academic decision making has been discussed include: Ford v. Nicks, 741 F.2d 858, 864 (6th Cir. 1984); Zahorik v. Cornell Univ., 729 F.2d 85, 93 (2d Cir. 1984); Kumar v. Univ. of Massachusetts, 774 F. 2d 1, 11 (1st Cir. 1985); cert denied, 106 S.Ct. 1496 (1985); Merrill v. Southern Methodist Univ., 806 F.2d 600, 606 (5th Cir. 1986); Davis v. Weidner, 596 F.2d 726, 731 (7th Cir. 1979); Molthan v. Temple Univ., 778 F.2d 955, 962 (3d Cir. 1985); Keyes v. Lenors Rhyne College, 552 F.2d 579, 581 (4th Cir. 1977); cert denied, 434 U.S. 904 (1977); Green v. Texas Tech Univ., 474 F.2d 594 (5th Cir. 1973); Faro v. New York Univ., 502 F.2d 1229, 1231-2 (2d Cir. 1974); Smith v. Univ. of North Carolina, 632 F.2d 316 (4th Cir. 1980); Craik v. Minnesota State Univ., 731 F.2d 532 (3rd Cir. 1980).

and Aikens, supra. The Court holds that historical disparity can excuse present disparity; that defendant has no burden of providing evidence of the reason for the disparity; and that plaintiffs, in order to prevail, must account for unmeasurable variables. In addition, it denies an adequate opportunity to demonstrate pretext, as required by Burdine, supra.

When the Ninth Circuit says that the decision making of academic employers is entitled to special deference, it is contrary to the intent of the 1972 amendments to Title VII, and raises an issue upon which the circuits differ and this Court has never spoken.

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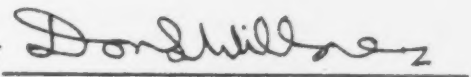
The petition for writ of certiorari should be granted.

Respectfully submitted,

WILLNER & KELLY

BY 

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1. Penk, et al v. Oregon State Bd. of Higher Education, 816 F.2d 458 (9th Cir. 1987).

Anna PENK, Elaine Spencer, Bernice Gilmore, Madronna Holden, Betty Leonard, Lois Schreiner, G. Joanne Amspoker, Margaret Lumpkin, and all others similarly situated,

Plaintiffs-Appellants,

vs.

OREGON STATE BOARD OF HIGHER EDUCATION,

Defendant-Appellee.

No. 85-3792.

United States Court of Appeals, Ninth Circuit

Argued and Submitted, September 5, 1986. Decided April 29, 1987.

Don S. Willner and Barrie J. Herbold, Portland, Or., for plaintiffs-appellants.

Virginia L. Linder and James S. Mountain, Jr., Salem, Or., and James J. Casby, Jr., Eugene, Or., for defendant-appellee.

Jacqueline W. Mintz and Douglas S. McDowell, Washington, D.C., for the

amicus curiae.

Appeal from the United States District Court for the District of Oregon.

Before EUGENE A. WRIGHT, GOODWIN and NELSON, Circuit Judges.

GOODWIN, Circuit Judge:

After nine months of trial in which were examined 58 individual claims of sex discrimination in salary, promotion, and tenure practices by the Oregon state system of higher education, the court granted individual relief in three claims, but found against the class plaintiffs and denied all other claims against the state board of higher education. The plaintiffs appeal as a class, and individually. We affirm.

Twenty-two women faculty members sued the defendant board under 42 U.S.C. Sections 2000e et. seq and 28 U.S.C. Section 1983. The Title VII claims were

tried. The Section 1983 claims were dismissed during pretrial proceedings. The case proceeded as a "pattern and practice" disparate treatment case, comparing the board's treatment of women faculty and male faculty in terms of rank, pay, promotion, tenure and administrative appointments. Statistical evidence played a major part in the trial.

The trial judge prepared a 487 page memorandum addressing the factual and legal issues. Within a document of that size, disappointed litigants are likely to find a number of points with which to disagree. This case is no exception.

The plaintiffs' failures of proof were not for want of effort. The trial produced 25,000 pages of testimony and rooms full of exhibits. The subject matter ranged over the history of women

in academic callings. The court heard about the economics of supply and demand, and the depressing effect of tenured, high salaried senior faculty, who are frequently older males, upon the salaries of junior faculty, who are frequently females, during times of taxpayer parsimony and shrinking budgets.

After the parties rested, the court determined that the state system of higher education had not intentionally discriminated against women. There is no substantial dispute that historical disparity existed. However, historical disparity does not give rise to a successful Title VII claim. The court found that, at worst, the state's efforts to bring its female employees into parity with its male employees had been impeded more by external economic factors than by lack of effort by the board to redress

historic imbalances.

Because we are satisfied that the trial court's findings of fact are not subject to reversal as clearly erroneous under Fed. R. Civ. P. 52(a), see Anderson v. City of Bessemer, 470 U.S. 564, 573-75, 105 S. Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985), and because we can conceive of no useful purpose in detailed rehearsal of the evidence, we will take up as briefly as possible the principal legal questions presented by the appeal.

I. BURDENS OF PROOF, PERSUASION AND PRODUCTION

[1] Plaintiffs assert that the court erred in allocating and applying the respective burdens in the class case. They contend that the court required too much of them and too little of the board. In essence, their contention is that the court erroneously neglected to adhere

strictly to the standards for the order and allocation of proofs set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). However, the McDonnell Douglas tripartite standard does not inflexibly apply to class action disparate treatment cases. See United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715, 103 S. Ct. 1478, 1481, 75 L.Ed.2d 403 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 n.6, 101 S. Ct. 1089, 1094 n. 6, 67 L.Ed.2d 207 (1981); Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531, 538 (9th Cir. 1982); B. Schlei & P. Grossman, Employment Discrimination Law 244 (2d ed. Supp. 1985).

Indeed, by the time a fully-tried class action disparate treatment case reaches appeal, we need not consider

whether the parties carried their respective burdens at the appropriate stages unless prejudicial errors, infecting distinct legal rulings, prevented a fair trial. Aikens, 460 U.S. at 715, 103 S. Ct. at 1481; Rios v. The Board of Regents of the University of Arizona, 811 F.2d 1248, 1249 (9th Cir. 1987); Benzies v. Illinois Dep't. of Mental Health and Developmental Disabilities, 810 F.2d 146, 148 (7th Cir. 1987); Gottlieb v. Tulane University of Louisiana, 809 F.2d 278 (5th Cir. 1987).

In Bazemore v. Friday, ___ U.S. ___, 106 S. Ct. 3000, 92 L.Ed.2d 315 (1986), a disparate treatment class action case, the Supreme Court responded to plaintiffs' assertion that the McDonnell Douglas order and allocation of proof had not been adhered to as follows:

"[I]f the defendants have not

> succeeded in having a case dismissed on the ground that plaintiffs have failed to establish a prima facie case, and have responded to the plaintiffs' proof by offering evidence of their own, the factfinder must then decide whether the plaintiffs have demonstrated a pattern or practice of discrimination by a preponderance of the evidence. This is because the only issue to be decided at that point is whether the plaintiffs have actually proved discrimination. . . . This determination is subject to the clearly erroneous standard on appellate review.

106 S. Ct. at 3008 (citations omitted). Thus, the only relevant burden in a class action disparate treatment case, assuming plaintiffs can avoid Rule 41 dismissal, is upon plaintiffs to prove the existence of discriminatory intent.

[2] In this action, at the close of plaintiffs' case-in-chief, the court denied the board's motion for Rule 41 dismissal and allowed the board to

introduce rebuttal evidence challenging plaintiffs' statistical and other evidence. The district court then evaluated the evidence to determine whether plaintiffs had demonstrated, by a preponderance, the existence of either a pattern or practice of discrimination or systematic purposeful discrimination. None was found. We hold that in reaching its decision, the district court placed appropriate burdens on plaintiffs for proof of discriminatory treatment.

II. CONSIDERATION OF ANECDOTAL, STATISTICAL, AND NONSTATISTICAL PROOF AND THEIR INTERRELATIONSHIP

Plaintiffs assert that the judge failed to consider their nonstatistical (or "anecdotal") evidence in the individual and class claims, and that she failed to consider the statistical evidence in the individual cases. Plaintiffs argue that the judge failed to

comprehend the interplay between the statistical evidence and the testimony of individual plaintiffs and other class members.

A. Individual Claims

When summarizing her conclusions on the individual claims, the judge noted that each individual plaintiff provided sufficient testimony to require the board to come forward with legitimate nondiscriminatory reasons for its actions. She then wrote:

> Considering the quality and quantity of the Board's explanations, each plaintiff should have come forward with evidence to show that the reasons offered by the Board were a pretext for sex discrimination. In order to carry their ultimate burden of persuasion, plaintiffs had to show that the Board's explanations were offered to conceal the Board's true purpose of sex discrimination. This portion of the plaintiffs' individual cases was entirely inadequate. Plaintiffs offered

> almost no evidence to impeach the Board's explanations of the allegedly illegal employment conditions. Without rebuttal testimony to establish that the Board's reasons were a pretext for sex discrimination, the named plaintiffs' individual cases, in most instances, had to fail.

While the McDonnell-Douglas scheme is not ritualistic, and while the court was free to decide whether the Board intentionally discriminated against the plaintiffs based upon all of the evidence before it, the case in chief presented by each plaintiff was, for the most part, weak; and the rebuttal cases presented by each plaintiff was, for the most part, nonexistent.

> "In most cases, only the named plaintiffs testified in support of her individual claim, and her testimony rarely did more than describe differences in employment conditions."

The quoted passage indicates that

the court may have viewed each individual case within its own evidentiary compartment. But even if the trier did require evidence of pretext relating specifically to each individual plaintiff, the ultimate result of the proof was a failure to establish pretense.

Generally, there are three types of evidence that can be used to show pretext: (1) direct evidence of discrimination, such as discriminatory statements or admissions, (2) comparative evidence, and (3) statistics. B. Schlei P. Grossman, Employment Discrimination Law 1314 (2d ed. 1983).

[3,4] Plaintiffs strongly attack the judge's reaction to their statistical evidence on the issue of pretext for the individual claims. Statistics may be used to show that a defendant's

articulated nondiscriminatory reason is pretextual. McDonnell-Douglas, 411 U.S. at 805, 93 S. Ct. at 1825; Lowe v. City of Monrovia, 775 F.2d 998, 1008 (9th Cir. 1986). However, while statistics are often probative in determining the existence of a pattern or practice of disparate treatment, their usefulness in proving pretext "depend[s] primarily upon their relevance to the specific decision affecting the individual plaintiff, [and not] those that affect plaintiff's protected class in general." Employment Discrimination Law, supra, at 1316.

Proof of general employment policies and practices may be particularly useful in showing pretext. Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 880, 104 S. Ct. 2794, 2801, 81 L.Ed.2d 718 (1984); McDonnell Douglas, 411 U.S. at 805, 93 S. Ct. at 1825; Sweat v.

Miller Brewing Co., 708 F.2d 655, 658 (11th Cir. 1983) (statistical evidence of employer's general policy and practice concerning minority employment to be considered on remand). In addition, more general comparative evidence may permit a court to fairly draw an inference of pretext. Furnco Construction Corp. v. Waters, 438 U.S. 567, 580, 98 S. Ct. 2943, 2951, 57 L.Ed.2d 957 (1978) (district court entitled to consider the racial mix of the workforce); O'Conner v. Peru State College, 781 F.2d 632, 637 (8th Cir. 1986) (inequities between men's and women's athletic programs considered); Holsey v. Armour & Co., 743 F.2d 199, 208 (4th Cir. 1984) (general atmosphere of discrimination and past practices may be considered), cert. denied, 105 S. Ct. 1395,84 L.Ed.2d 784 (1985).

[5] In this action, the memorandum opinion would have been stronger had it expressly stated, when reviewing the evidence of pretext in the individual cases, that the district judge had reviewed (1) all of the statistical proof, (2) the evidence of sexist attitudes on the part of male administrators and (3) the degrees of compliance with affirmative action policies. It does not follow, however, that there must be a new trial. We think the memorandum opinion indicates that the judge did, in fact, consider the relevant pretext evidence of a statistical and anecdotal nature introduced by plaintiffs. She simply found the evidence unconvincing as proof of pretext.

B. Class Action

[6] In a discriminatory treatment

class action, plaintiffs have the burden of proving by a preponderance of the evidence that sex discrimination was defendant's "standard operating procedure" maintained through systematic intentional discrimination. Bazemore, 106 S. Ct. at 3008; Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875-76, 104 S. Ct. 2794, 2799, 81 L.Ed.2d 718 (1984); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336, 97 S. Ct. 1843, 1855, 52 L.Ed.2d 396 (1977); Spaulding v. University of Washington, 740 F.2d 686, 700 (9th Cir.), cert. denied, 469 U.S. 1036, 105 S. Ct. 511, 83 L.Ed.2d 401 (1984).

[7] To establish the requisite discriminatory intent, plaintiffs may offer statistical, nonstatistical, and anecdotal evidence. However, even if a district court decides that plaintiffs

have established prima facie evidence of intentional discrimination, for plaintiffs to prevail, the district court must still be persuaded by a preponderance of the evidence that actual actionable discrimination exists. Bazemore, 106 S. Ct. at 3008; Burdine, 450 U.S. at 257, 101 S. Ct. at 1095; Hazelwood School District v. United States, 433 U.S. 299, 307-08, 97 S. Ct. 2736, 2741, 53 L.Ed.2d 768 (1977); Gay, 694 F.2d at 537 n. 4 ("it is clear that the burden which shifts to the defendant upon the establishment of a prima facie case is a burden of production only; the burden of persuasion remains with the plaintiff at all times").

In ruling on the board's motion to dismiss the class action, the judge indicated that she had examined the individual examples of discrimination to

see whether they bolstered plaintiffs' statistical case. In her introduction to the class action findings and conclusions, she explained:

> Plaintiffs' statistical evidence is the foundation for this claim [pattern or practice], although the court will also evaluate other evidence presented as it may bolster or detract from the statistical evidence. . . .
>
> The course that the court will follow in regard to the class action claim will be to evaluate the statistical evidence before it, keeping in mind the court's rulings in the named plaintiffs' cases, as well as the other evidence.

[8] The court determined that the anecdotal evidence did not establish proof of a patter or practice of discrimination even though it had established individual violations in three instances. The court noted when summarizing her conclusions on the class claim that:

> Whatever the differences in employment conditions between men and women in the Oregon State System of Higher Education, they have been explained by the Board on legitimate, nondiscriminatory reasons, except in three instances.

We are satisfied that the court properly considered the relevant anecdotal evidence when it ruled on the class action.

Statistical evidence was the primary foundation of plaintiffs' class action. Plaintiffs offered copious amounts of evidence, including multiple regression analyses, directed toward proving discriminatory intent. The board responded by challenging the accuracy and importance of plaintiffs' evidence and by offering its own statistical evidence to show lack of discriminatory intent. The court found that there was a failure of proof as to the existence of

discriminatory intent. Plaintiffs assign this finding as error and assert that the statistical evidence, both their own and defendant's, proves a pattern or practice of sex discrimination "at every institution in every year studied in pay, rank, and tenure decisions."

[9] In response to statistical evidence presented in an effort to establish discriminatory intent, a defendant is always entitled to offer rebuttal evidence. Rebuttal evidence usually includes an explanation of statistical disparities based on neutral factors. It can, however, be limited to (1) a showing that the plaintiffs' statistics are flawed, (2) a demonstration that the disparities generated or isolated by the statistics are not statistically significant or actionable, or (3) presentation by the

defendant of statistical evidence contradicting that of the plaintiffs. See Teamsters, 431 U.S. at 339-340, 97 S. Ct. at 1856 ("statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted").

[10] In the employment discrimination context, a defendant should also be entitled to challenge the ability of statistical evidence based on mathematical regressions to approximate the actual determinative factors in the employment decision-making process. See T. J. Campbell, Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet, 36 Stan. L. Rev. 1299, 1305-1312 (1984) (arguing that courts should not rely on regression analyses whose "goodness of fit" or

"adjusted R^2" - a measurement of the degree to which the statistical model reflects actual decision-making - has been called into serious question). This concern is particularly important where courts examine academic and professional employment and advancement decisions which properly include a high regard for subjective personnel qualities and characteristics. See Spaulding, 740 F.2d at 704; Zahorik v. Cornell University, 729 F.2d 85, 92-94 (2nd Cir. 1984); Green v. Board of Regents of Texas Tech. University, 474 F.2d 594, 596 (5th Cir. 1973).

The court accepted and analyzed a prodigious amount of statistical evidence proffered by both plaintiffs and defendant in the forms of expert testimony, cross-examination, and documentary evidence. In the end, after

reviewing the lengthy course of the trial, the district court decided that neither side's statistical evidence accurately reflected the complex factors and motivations guiding the board's employment, salary, and advancement decisions.

In Bazemore, the Supreme Court reversed a lower court decision that had deemed multiple regression analyses that did not include all measurable variables to be "unacceptable as evidence of discrimination." 106 S. Ct. 3008-09. The Court seemed to address the problem presented here, namely, the weight properly accorded multiple regression evidence.

> While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an

> analysis which accounts for the major factors 'must be considered unacceptable as evidence of discrimination.' Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.
>
> Importantly, it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence. Whether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant. However, as long as the court may fairly conclude, in light of all the evidence, that is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail.

106 S. Ct. at 3009 (citations and footnote omitted).

Bazemore, however, does not give

blanket approval to the introduction of all evidence derived from multiple regression analyses. See id. 3009, n. 10 ("There may, of course, be some regressions so incomplete as to be inadmissible as irrelevant.")

[10] Plaintiffs assert that the district judge required too much of their statistical proof. We disagree. The district judge admitted statistical multiple regression evidenced at trial and then chose to discount the weight of that evidence during her deliberations following trial. In her memorandum, the district judge expressly noted that in plaintiffs' statistical analyses important decision-making variables were either missing or inadequately represented. Missing parts of the plaintiffs' interpretation of the board's decision-making equation included such

highly determinative quality and productivity factors as teaching quality, community and institutional service, and quality of research and scholarship. The district court concluded that variables missing from the model must have had a significant influence on salary and advancement decisions. Without reiterating the details of the district court's extensive criticisms of the plaintiffs' statistical evidence, after our own consideration of the evidence, we hold that the district court did not clearly err in concluding that the plaintiffs failed to establish the existence of actionable discrimination by a preponderance of the evidence.[1]

---

[1]We note in passing that it is often acceptable in the social sciences to use a statistical model for proof of behavior even where, in an absolute sense, that model does not describe the data well. However, courts are not free to decide

We note that by finding fault and infirmities in the statistical evidence presented, the district judge was neither evading her responsibility to examine the evidence, nor placing impossible burdens on the plaintiffs.[2] The judge was simply unpersuaded. The heavy burden accepted by the plaintiffs in this action was ultimately to prove intentional discrimination across the whole state

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legal propositions on hypothetical evidence. This is especially true where courts are asked to draw inferences as to the existence of hidden discriminatory motives from statistical evidence. See Spaulding v. University of Washington, 740 F.2d 686, 704 (9th Cir.), cert. denied, 469 U.S. 1036, 105 S. Ct. 511, 83 L.Ed.2d 401 (1984).

[2] Plaintiffs seize upon a possible erroneous belief held by the district judge that the board was correct in its use of faculty rank as an "objective piece of data." This intermediate shifting of the burden of persuasion, however, even if error, does not appear to have affected the outcome of the trial.

system of higher education. Although an attempt to prove a narrower case might have prevailed, the plaintiffs failed to prove this case.

III. DENIAL OF A FAIR TRIAL

Plaintiffs assert that they were denied a fair trial by the cumulative effect of numerous pretrial and trial errors. They urge reversal and remand for a new trial before a different judge.

District courts have broad discretion in controlling the conduct of a trial Railroad Dynamics, Inc. v. A. Stucki Co., 727 F.2d 1506, 1515 (Fed. Cir.), cert. denied, 469 U.S. 871, 105 S. Ct. 220, 83 L.Ed.2d 150 (1984); Kotz v. Bache Halsey Stuart, Inc., 685 F.2d 1204, 1208 (9th Cir. 1982). Federal Rule of Evidence 611(a) directs trial judges to exercise "reasonable control" over the presentation of evidence and

interrogation of witnesses. "Very few cases outside of the criminal law area support an appellate finding of general judicial misconduct during trial. . . . The standard for reversal is whether the trial was unfair." Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1289 (9th Cir. 1984), cert. denied, 469 U.S. 1190, 105 S. Ct. 963, 83 L.Ed.2d. 968 (1985). Some of plaintiffs' allegations on this issue raise questions, but they do not approach a showing that the trial was unfair.

A. Exclusion of Statistical Experts

[12] Plaintiffs challenge, for example, the court's order to exclude the testimony of two of their expert witnesses, Doctors Arrow and Olkin. The exclusion was a sanction imposed for violation of court orders. Because scheduling was important in this complex

litigation, we defer to the court's discretion unless it was clearly abused. Obviously, there was a misunderstanding on the part of plaintiffs' counsel. However, as the court noted, he failed to "memorialize" his understanding.

Technically, he violated the court's scheduling orders. Judge Frye's finding to that effect is not clearly erroneous. See United States v. National Medical Enterprises, Inc., 792 F.2d 906, 911 (9th Cir. 1986) (court's determination that an order was violated is reviewed under the clearly erroneous standard). No showing of willful disobedience is required for an exclusion order. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 207-08 (1958) (party "refuses to obey" simply by failing to comply). When a trial runs on month after month, some tightening of

schedules is to be expected.

The challenged preclusion order is justified under Fed. R. Civ. P. 37(b)(2)(B). The order was specifically tailored to the violation and was not an abuse of discretion. See Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 897-98 (8th Cir. 1978) (no abuse of discretion in court's exclusion of exhibits and witnesses not disclosed in compliance with pretrial orders); United States v. Sumitomo Marine & Fire Insurance Co., Ltd., 617 F.2d 1365, 1369-70 (9th Cir. 1980) (order precluding government from introducing evidence as sanction for failing to comply with discovery order was not an abuse of discretion).

B. Rebuttal Time Schedule

Plaintiffs assert that they were unfairly denied an opportunity to rebut defendant's statistical evidence. There

was much disagreement over scheduling of the rebuttal case, complicated by the court's demand for a termination date in early November 1984 to prepare for another trial.

On September 26, 1984, the court ordered plaintiffs to submit their statistical rebuttal reports on October 3, before the board's statistical experts testified. she explained that these reports "relate to defendant's statistical reports, which plaintiffs have had since May." She noted that plaintiffs already had violated her scheduling order by missing the September 10 deadline.

Later, On October 17, 1984, she admonished plaintiffs for their failure to comply with the scheduling order regarding the submission of new case-in-chief statistical studies. This failure "has resulted in a convolution in the

order of proof in this case," she wrote. Then, she established the rebuttal schedule about which plaintiffs now complain and by written opinion overruled plaintiffs' objections.

[13] The court has broad discretion in fashioning appropriate scheduling orders. See Rodriguez v. Olin Corp., 780 F.2d 491, 494 (5th Cir. 1986) (order of proof committed to district court discretion); Coursen v. A.H. Robbins Co., Inc., 764 F.2d 1329, 1340 (9th Cir. 1985) (timing of trials and control of docket are left to trial court discretion).

[14] As explained below, the court may have severely restricted plaintiffs in their ability to run new studies on the redefined class. While it is true that the defense was also restricted in its proof, most of the court's time constraints fell on plaintiffs. Nonetheless, these constraints followed

plaintiffs' repeated failure to meet the court's deadlines. These facts do not establish reversible error.

C. Late Redefinition of Class

Plaintiffs assign error to the court's redefinition of the class after six months of trial and the refusal to permit additional discovery.

By order filed October 13, 1981, the court certified a class "of all those women faculty members who . . . were employed as instructor through professor" during the relevant period at the eight Oregon universities. In her December 10, 1982 order denying defendant's motion to certify an interlocutory appeal of the class certification issue, the judge wrote that she "may alter the class certification decision at any time before the final decision on the merits under rule 23(c)(1)."

On August 10, 1984, she limited the

class to "regular teaching faculty," excluding nonteaching faculty and nonregular instructors. Plaintiffs do not dispute the court's power to adjust the class definition to conform to the proof. It is the court's manner of class reduction to which they object.

After the plaintiffs moved for reconsideration and clarification of the class redefinition order, or alternatively for more discovery time to create a new data base for further statistical studies, the court permitted plaintiffs to present new statistical studies by September 26, 1984. That deadline was extended to October 3, but apparently was disregarded by plaintiffs. The court's attempts to accommodate the late submission of new studies led to the disrupted rebuttal schedule previously discussed.

[15] Again, the question is whether

the plaintiffs were deprived of a fair opportunity to prove their case. The court had allowed so much delay and redundant material to enter the case at this point that control was becoming a problem. The plaintiffs do not establish such an abuse of discretion as to warrant another trial with an expanded plaintiff class if one could be established.

D. Daily Transcript

Defendant board arranged for a daily transcript at a cost of $1,000 per day. the court reporter furnished a copy to the court, as is customary in most districts. The reporter did not offer a free copy to plaintiffs. The sale of such copies is a regulated industry. Plaintiffs now assert that the defendant's action in providing the court with a daily transcript amounts to an impermissible ex parte communication. they allege prejudice due to the

defendant's ability, and their inability, to refer to transcripts during discussion with the court.

[16] We have found no authority holding that furnishing daily transcripts to the court is an illegal or unethical ex parte communication. There simply is no "communication." The defense paid the official court reporter to prepare daily transcripts. That reporter was employed by the court. As long as testimony was being transcribed for someone's benefit, the court could gain access to that transcript simply by requesting an extra copy. It was the court's prerogative to do so. The fact that the board may have initiated the extra copying is irrelevant. Plaintiffs could have purchased any or all of the transcripts simply by placing orders for them. This court has no basis upon which to find reversible error in the court's reference

from time to time to a transcript of the testimony.

E. Cost of Corrected Data Base

During discovery, plaintiffs acquired copies of the board's central computer base tapes of faculty information from 1977 through 1982. These tapes had been maintained in the ordinary course of business. These data were the basis for the plaintiffs' statistical studies in the class action phase of the case.

After both sides' experts had discovered inaccuracies in the original data base, the board allowed plaintiffs access to their files and business records. Plaintiffs moved to compel the board to correct and update the inaccuracies in the tapes. The judge rules that the board "was not obligated under the Federal Rules to make data compilations more extensive or accurate

than those used by the defendant in the ordinary course of defendant's business." She ordered that the board make available to plaintiffs any revisions to the data base made in preparation for trial with costs to "be borne equally by plaintiffs and defendants."

The board chose to correct the inaccurate data base for use at trial, at a cost of approximately $100,000. Plaintiffs declined to accept and pay for half the cost of these corrections. They now assert that the court erred in requiring them to share the costs of correcting the data base. We do not think, however, that the district court had any obligation to require the defendant to subsidize the plaintiffs' costs of litigation.

Under the Fed. R. Civ. P.26(c)(2), the court may order that "discovery may be had only on specified terms and

conditions." This rule empowers district courts to order that a party seeking discovery pay a portion of the expenses incurred in obtaining discoverable materials. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358, 98 S. Ct. 2380, 2393, 57 L.Ed.2d 253 (1978); In re Puerto Rico Electric Power Authority, 687 F.2d 501, 507 (1st Cir. 1982); American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443, 448 (W.D. Mo. 1976) (defendant ordered to pay one-half of the reasonable costs of preparing interviews and obtaining transcripts thereof). Such orders are reviewed for an abuse of discretion. National Independent Theatre Exhibitors, Inc. v. Buena Vista Distribution Co., 748 F.2d 602, 609 (11th Cir. 1984), cert. denied, 471 U.S. 1056, 105 S. Ct. 2120, 85 L.Ed.2d. 484 & ____ U.S. ____, 106 S. Ct. 544 88 L.Ed.2d 473

(1985). There was no abuse of discretion here.

CONCLUSION

While the plaintiffs find fault with trial court's use of the statistical evidence, and with 20-20 hindsight, this court itself might view some of the statistical evidence differently, we have found nothing in the record to convince us that another trial would produce a different result. The three faculty members who did prove some elements of discrimination in their own cases recovered appropriate judgments. The class as a whole failed to establish by the preponderance of the evidence that the Oregon State Board of Higher Education had any systematic intent to discriminate or that discrimination was a "standard operating procedure" of the board. The statistics may have proved that there were disparities in salaries

and other terms of employment, but not that they were the product of disparate treatment. The trial judges' findings of fact withstand Rule 52 review.

AFFIRMED

2. 42 U.S.C. Sec. 2000e-2(a) (1984).

2000e-2. Unlawful Employment Practices

(a) It shall be an unlawful employment practice for an employer - -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. Sec. 2000e-5 (f)(3) and (k) (1984).

(f)(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of section 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

. . .

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

3. Oregon Revised Statutes (ORS) Chapter 351

DEPARTMENT OF HIGHER EDUCATION
(State Board)

351.010 State Board of Higher Education. The Department of Higher Education shall be conducted under the control of a board of 11 directors, to be known as the State Board of Higher Education. Two shall be students admitted at different public institutions of higher education in Oregon at the time of their appointment. [Amended by 1973 c.379 §1]

351.020 Directors; appointment; confirmation. The directors shall be citizens of Oregon and shall be appointed by the Governor. The appointment is subject to the confirmation of the Senate in the manner provided by ORS 171.562 and 171.565. No director who is not a student at the time of his appointment may be an employe of any of the institutions or departments under the control of the State Board of Higher Education, nor shall more than seven graduates of or students admitted at these institutions, nor more than three graduates of or students admitted at any one of these institutions or departments, be members of the board at any time. To assist the Governor in making appointments of the student members provided in ORS 351.010, the duly organized and recognized entities of student government at each state institution of higher education shall submit a list of nominees to the Governor. The entities are entitled to no more than three nominees per school. The Governor shall consider this list in the selection of student members to the State Board of Higher Education. [Amended by 1955 c.284 §1, 1969 c.695 §6, 1973 c.379 §2]

351.030 [Repealed by 1961 c.167 §38 (171.560 enacted in lieu of 351.030)]

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351.040 Term, removal; compensation and expenses of directors. (1) Directors shall hold office for a term of four years except for directors who are students at the time of appointment, whose terms shall be two years. All terms begin July 1 of the year of appointment. No person may be appointed to serve consecutively more than two full terms as a director. Any person appointed to fill a vacancy occurring prior to the expiration of any term shall be appointed for the remainder of such term.

(2) The Governor may remove any member of the board at any time for cause, after notice and public hearing, but not more than three members shall be removed within a period of four years, unless it be for corrupt conduct in office.

(3) The directors are entitled to compensation and expenses as provided in ORS 292.495.
[Amended by 1961 c.167 §41; 1967 c.530 §8; 1969 c.314 §25; 1971 c.485 §3; 1973 c.379 §3]

351.050 Officers; meetings; quorum. The board shall organize by the election from its members of a president who shall serve for the fiscal year for which he is elected. The board shall meet regularly once every three months at such times and places as the president may determine. Special meetings may be called by the president upon the written request of any six members of the board. Six members shall constitute a quorum for the transaction of business.
[Amended by 1973 c.379 §4]

351.060 Board general powers as to control and management of property; power as to litigation. The State Board of Higher Education may:

(1) Control and provide for, subject to the conditions of this section, the custody and occupation of the grounds, buildings, books, papers and documents belonging to each and all the institutions, departments or activities under the control of the State Board of Higher Education.

(2) Manage, control and apply all property of whatever nature given to or appropriated for the use, support or benefit of any or all of the institutions, departments or activities under the control of the State Board of Higher Education, according to the terms and conditions of such gift or appropriation.

(3) Erect, improve, repair, maintain, equip and furnish buildings, structures and lands for higher education.

(4) Acquire, receive, hold, control, convey, sell, manage, operate, lease, lend, invest, improve and develop any and all property, real or personal:

(a) Given to any of the institutions, departments or activities under the control of the State Board of Higher Education by private donors, whether such gifts are made to the State Board of Higher Education or to the State of Oregon; or

(b) Acquired by any other method or from any source by the State Board of Higher Education for the benefit of any of the institutions, departments or activities under the control of the board, subject, however, to the applicable provisions of ORS 271.300 to 271.370, 271.390 and 351.210.

(5) Take and hold mortgages on real and personal property acquired by way of gift or arising out of transactions entered into in accordance with the powers, duties and authority given to the board by this section, ORS 351.070 and 351.150.

(6) Institute, maintain and participate in suits and actions and other judicial proceedings, in the name of the State of Oregon, for the foreclosure of such mortgages or for the purpose of carrying into effect any and all of the powers, duties and authority given to the State Board of Higher Education by this section, ORS 351.070 and 351.150. [Amended by 1959 c.570 §1; 1975 c.771 §31a]

351.065 Consent of, access to and control of personnel records. (1) The State Board of Higher Education may, for each institution, division and department under its control adopt rules and specific orders by or through the institutional executive of each institution governing access to personnel records of the institution, division or department, which are less than 25 years old.

(2) Rules adopted under subsection (1) of this section shall require that personnel records be subjected to restrictions on access unless upon a finding by the institutional executive that the public interest in maintaining individual rights to privacy in an adequate educational environment would not suffer by disclosure of such records. Access to such records may be limited to designated classes of information or persons, or to stated times and conditions, or to both, but cannot be limited for records more than 25 years old.

(3) No rule or order promulgated pursuant to this section shall deny to a faculty member full access to the member's personnel file or records kept by the board or its institutions, schools or departments, except as provided in paragraphs (d) and (e) of this subsection.

(a) The number of files relating to the evaluation of a faculty member shall be limited to three, to be kept in designated, available locations.

(b) Any evaluation received by telephone shall be documented in each of the faculty member's files by means of a written summary of the conversation with the names of the conversants identified.

(c) A faculty member shall be entitled to submit, for placement in the three files, evidence rebutting, correcting, amplifying or explaining any document contained therein and other material which the member believes might be of assistance in the evaluation process.

(d) Letters and other information submitted in confidence to the board or its institutions, schools or departments prior to July 1, 1975,

shall be maintained in the files designated. However, if a faculty member requests access to those files, the anonymity of the contributor of letters and other information obtained prior to July 1, 1975, shall be protected. The full text shall be made available except that portions of the text which would serve to identify the contributor shall be excised by a faculty committee. Only the names of the contributors and the excised portions of the documents may be kept in a file other than the three prescribed by paragraph (a) of this subsection.

(e) Confidential letters and other information submitted to or solicited after July 1, 1975, by the board or its institutions, schools or departments prior to the employment of a prospective faculty member are exempt from the provisions of this section. However, if the member is employed by the board or its institutions, schools or departments, the confidential preemployment materials shall be placed in the three authorized files. If a faculty member requests access to the member's files, the anonymity of the contributor of confidential preemployment letters and other preemployment information shall be protected. The full text shall be made available, except that portions of the text which would serve to identify the contributor shall be excised and retained in a file other than the three designated in paragraph (a) of this subsection.

(f) Classroom survey evaluation by students of a faculty member's classroom or laboratory performance shall be anonymous. The record of tabulated reports shall be placed in at least one of the files designated in paragraph (a) of this subsection. All survey instruments used to obtain evaluation data shall be returned to the faculty member.

(g) After July 1, 1975, the board, its institutions, schools or departments when evaluating its employed faculty members shall not solicit nor accept letters, documents or other materials, given orally or in written form, from individuals

or groups who wish their identity kept anonymous or the information they provide kept confidential.

(4) No rule or order promulgated pursuant to this section limits the authority of the institution, division or department to prepare, without identification of individual persons who have not consented thereto, statistical or demographic reports from personnel records.

(5) Any category of personnel records specifically designated as confidential pursuant to valid rules or orders pursuant to this section shall not be deemed a public record for the purposes of ORS 192.420.

(6) As used in this section, "personnel records" means records containing information kept by the institution, division or department concerning a faculty member and furnished by the faculty member or by others about the faculty member at the member's or at the institution, division or department's request, including, but not limited to, information concerning discipline, membership activity, employment performance or other personal records of individual persons. [1971 c.566 §1; 1975 c.317 §1; 1979 c.159 §1]

351.070 Board general powers as to higher education and institutions; student records. (1) The State Board of Higher Education may, for each institution under its control:

(a) Appoint and employ a president and the requisite number of professors, teachers and employes, and prescribe their compensation and tenure of office or employment.

(b) Demand and receive the interest mentioned in ORS 352.510 and all sums due and accruing to the institutions of higher education for admission and tuition therein, and apply the same, or so much thereof as is necessary, to the payment of the compensation referred to in paragraph (a) of this subsection and the other current expenses of the institutions.

(c) Prescribe fees for enrollment into the institutions. Such enrollment fees shall include tuition for education and general services and such other charges found by the board to be necessary to carry out its educational programs.

(d) Prescribe incidental fees for programs under the supervision or control of the board found by the board, upon its own motion or upon recommendation of the recognized student government of the institution concerned, to be advantageous to the cultural or physical development of students.

(e) Upon recommendation of the recognized student government, collect optional fees authorized by the institution executive, for student activities not included in paragraph (c) or (d) of this subsection. The payment of such optional fees shall be at the option and selection of the student and shall not be a prerequisite of enrollment.

(f) Confer, on the recommendation of the faculty of any such institution, such degrees as usually are conferred by such institutions, or as they deem appropriate.

(g) Prescribe the qualifications for admission into such institutions.

(2) The State Board of Higher Education may, for each institution, division and department under its control:

(a) Supervise the general course of instruction therein, and the research, extension, educational and other activities thereof.

(b) Adopt rules and bylaws for the government thereof, including the faculty, teachers, students and employes therein.

(c) Maintain cultural and physical development services and facilities therefor and, in connection therewith, may cooperate and enter into agreements with any person or governmental agency; and may provide student health services and contract therefor.

(d) Except as otherwise provided by law, prescribe and collect charges for services rendered to any person or entity.

(e) Pursuant to the procedures described in ORS 351.065, adopt rules relating to the use of and access to student records of the institutions including the opportunity to challenge inaccurate information placed in student records. However, except for directory information, records containing information kept by the institution, division or department concerning a student and furnished by the student or by the institution, division or department, including, but not limited to, information concerning discipline, counseling, membership activity, academic performance or other personal matters, shall not be available to public inspection or disclosure for any purpose except with the written consent of the student who is the subject of the record or upon order of a court of competent jurisdiction or, in an emergency, to appropriate persons if such information is necessary to protect the health or safety of the student or other persons. Nothing contained in this paragraph prohibits authorization of the inspection of such records by institution officials or employes who have a legitimate educational interest in inspecting student records, or by any representative of a state or federal governmental agency that is required by law to inspect student records. Rules may be adopted permitting release of personally identifiable information in connection with financial aid for which a student has applied or which a student has received. Directory information shall be defined by rules adopted by the State Board of Higher Education.

(3) As used in subsection (2) of this section, "legitimate educational interest" means the demonstrated need to know by those officials of an institution who act in the student's educational interest, including faculty, administration, clerical and professional employes, and persons who manage student record information.

[Amended by 1953 c.545 §2; 1971 c.375 §1; 1971 c.708 §9; 1973 c.331 §1; 1979 c.159 §2]

351.072 Adoption of certain standards not subject to rulemaking procedures; limitations. (1) Notwithstanding ORS 183.310 to 183.550, the following actions may be taken by the State Board of Higher Education or the educational institutions under its control without compliance with the rulemaking provisions of ORS 183.310 to 183.550:

(a) Adoption of standards, regulations, policies or practices by any of the educational institutions under the control of the State Board of Higher Education relating primarily to admissions, academic advancement, classroom grading policy, the granting of academic credits, granting of degrees, scholarships and similar academic matters.

(b) Adoption of fees or fee schedules by the State Board of Higher Education or any of the educational institutions under its control, relating to charges for symposiums, conferences, short courses, food, books or other retail goods, prices of admission to athletic, entertainment or cultural events or advertising rates in student or institutional publications. However, student loan service charges, charges levied as penalties for prohibited conduct, general tuition, building fees, incidental fees, health service fees and residence hall and housing charges shall be adopted in accordance with the provisions of ORS 183.310 to 183.550.

(2) Any standards, regulations, policies, practices or fees adopted under this section by the State Board of Higher Education or by any of the educational institutions under its control shall be reduced to writing and made available to interested persons upon request. [1979 c.593 §31]

(Chancellor)

351.075 Chancellor of State Board of Higher Education; appointment; qualifications; compensation. (1) The State Board of

Higher Education shall appoint a chief executive officer who shall be known as the Chancellor of the State Board of Higher Education and who shall serve at the pleasure of the board. The board may appoint one or more assistants as may be necessary.

(2) The chancellor and his assistants shall be persons who by training and experience are well qualified to perform the duties of their offices and to assist in carrying out the functions of the board under ORS 351.010 to 351.070, 351.075 to 351.840, 352.010 to 352.055, 352.065 to 352.370, 352.390, 352.400 and 352.510 to 352.990.

(3) The State Board of Higher Education shall fix the compensation of the chancellor and his assistants. [1971 c.708 §10]

351.080 [Repealed by 1961 c.238 §1]

351.085 Duties and powers of chancellor. The Chancellor of the State Board of Higher Education shall exercise, under the direction of the State Board of Higher Education, the administrative authority necessary to carry out the policies of the board with respect to the institutions, departments or activities under the control of the board. In carrying out his duties, the chancellor shall:

(1) Act as administrative officer of the State Board of Higher Education.

(2) Maintain a centralized service program for all institutions, departments and activities, including but not limited to, accounting, statistical services, capital construction, management analysis, legal services, academic affairs and educational research.

(3) Collect and compile information and statistics relative to the operation of the institutions, departments and activities of the State Board of Higher Education.

(4) Prepare and submit to the State Board of Higher Education an annual operating budget for all institutions, departments and activities of the board.

(5) Oversee the preparation and submission to the State Board of Higher Education of the biennial budget requests of the institutions, departments and activities for consideration by the board as the budget request to the Governor under ORS 351.090. The chancellor shall provide analyses of the budget requests of the institutions, departments and activities, including in such analyses alternative considerations as may be necessary or desirable for the board in the adoption of its budget request.

(6) Appoint, subject to the State Personnel Relations Law, and with the approval of the State Board of Higher Education, such personnel as may be necessary for the performance of his duties.

(7) Designate, if he wishes, one or more suitable persons to sign or countersign warrants, vouchers, certificates, or other papers and documents requiring the signature of the chancellor.

(8) Prepare the agendas for State Board of Higher Education meetings and provide an analysis of proposals made to the board, including such alternatives as may be necessary or desirable for their consideration, and make recommendations thereon.

(9) Prepare and submit to the State Board of Higher Education on or about December 31 of each year an annual report in which he describes the principal activities of the Department of Higher Education during the fiscal year ending June 30. The report shall include a statement of all funds received, the source or sources from which received, the expenditure and disbursement of all funds and the purposes for which they were expended. The report shall contain a statement of the number of students enrolled in each institution, department or activity, the number of degrees conferred, the improvements made and new courses of instruction added, together with a statement showing a general way the status of all activities and functions of the State Board of Higher Education.

(10) Keep a record of the transactions of the State Board of Higher Education.

(11) Have the custody of all books, papers, documents and other property belonging to the State Board of Higher Education.

(12) Give such instructions as may be necessary to carry out the directives of the State Board of Higher Education and forward them to the various institution presidents and heads of departments and activities.

(13) Provide for meetings of the presidents and principal executives of the institutions, departments and activities, at such times as the State Board of Higher Education may direct, such meetings to be open to any member of the board. At such meetings, the executives of the Department of Higher Education may propose policies or policy changes or statements for consideration by the board and develop recommendations concerning allocations of funds.

(14) The chancellor shall perform such other administrative assistance and consider other administrative matters as the State Board of Higher Education may require. [1971 c.708 §11]

(Administration)

351.090 Standardization of accounts and records; preparation of budget; allocation of funds. The board of higher education shall prescribe for all state-supported higher educational institutions a standardized system of accounts and records. The board shall prepare biennially, at such time as he shall require, a report to the Governor containing the proposed budget for the succeeding biennium covering in detail the purposes for which all expenditures shall be made. In preparation of this budget the

board may allocate to the respective institutions over which it is authorized to exercise supervision and control all funds then available and all funds which under laws then existing become available during the succeeding biennium from all sources, so far as they can be ascertained, in accordance with the board's higher educational development program.

351.095 [1971 c.708 §8; repealed by 1983 c.194 §1]

351.100 Advertising and publicity. All advertising and publicity on behalf of all branches of state-supported higher education shall emanate from and bear the name of the Department of Higher Education, and shall be conducted in such a way as to present to the citizens of the state and prospective students a fair and impartial view of the higher educational facilities provided by the state and the prospects for useful employment in the various fields for which those facilities afford preparation.

351.110 Relationship with state legislature. All relationships and negotiations between the state legislature and its various committees and the institutions of higher education shall be carried on through the Department of Higher Education. No subordinate official representing any of the separate institutions shall appear before the legislature or any committee except upon the written authority of the board of higher education.

351.120 [Amended by 1959 c.564 §14; renumbered 351.605 and then 348.210]

351.130 Encouragement of gifts to institutions; use of gifts. The board of higher education shall encourage gifts to the institutions by faithfully devoting such funds to the institution for which intended and by other suitable means. All gifts raised by any institution or given to it shall be held for the exclusive use of such institution, subject to the terms of gift. Subject to such terms, such gifts to the institutions and the Department of Higher Education

may be invested in securities which constitute legal investments for trust funds held for charitable or educational purposes, in lawfully issued interest-bearing bonds or obligations of the State of Oregon and in real property.

351.140 Board power to purchase real property. (1) The State Board of Higher Education may purchase such real property as in its sole discretion may be necessary for the present or future development of any of the schools or institutions under its jurisdiction. The board may enter into contracts of purchase or agreements which it deems necessary in carrying out this authorization.

(2) The board may apply any funds coming into its hands, and applicable thereto, toward the purchase of property authorized under this section. The board may also mortgage or pledge any property so purchased, or its contracts to purchase, or in relation thereto, together with the income from such property, to secure the payment of the purchase price thereof.

351.150 Title to institution realty; conveyances. Legal title to all real property acquired by any of the institutions under the control of the State Board of Higher Education shall be taken and held in the name of the State of Oregon. Legal title to all real property heretofore or hereafter conveyed to any such institutions shall be deemed to be conveyed to and vested in the State of Oregon. Authorized conveyances of all real property acquired by or vested in the State of Oregon for the use or benefit of any such institutions, other than the university lands referred to in ORS 273.251, shall be executed in the name of the State of Oregon by the president and secretary of the board of higher education. Nothing in this section or in ORS 351.060 shall be considered as exempting such property from taxation.

351.153 "Structure" defined. As used in ORS 351.160, 351.170, 351.180, 351.350, 351.440 and 351.450, "structure" includes, but is not limited to, paving, sidewalks, curbs, gutters, sewers, drainage works, vehicular parking facilities, lighting facilities, retaining walls and other constructed or erected improvements to real property. [1971 c.361 §2]

351.155 Authority to sell forest products on institution realty. Notwithstanding the applicable provisions of ORS 279.025 to 279.031, 279.310 to 279.356 and 279.400 to 279.990, the State Board of Higher Education may, in the management of all forest lands under its control and supervision, sell the forest products on such lands in the same manner as is provided in ORS 530.059, and for that purpose the State Board of Higher Education shall have the same powers with respect to experimental or research projects in the field of forest land management or for forest product utilization on forest lands under its control as the State Forester has pursuant to the provisions of ORS 530.050 and 530.059. [1961 c.134 §1]

351.160 Building construction. (1) The board of higher education may undertake the construction of any building or structure for higher education when, in the judgment of the board, it appears that the building or structure will be wholly self-liquidating and self-supporting from revenues to accrue from the operation thereof and from gifts, grants or building fees, and from unobligated revenues of buildings or projects of like character. The board may enter into contracts for the erection, improvement, repair, equipping and furnishing of buildings and structures for dormitories, housing, boarding, off-street motor vehicle parking facilities and other purposes for higher education pursuant to Article XI-F (1) of the Oregon Constitution, ORS 351.160 to 351.190, 351.350 to 351.460, 351.480 and 351.490.

(2) The board may also undertake the construction of those buildings and structures that are designated by the Legislative Assembly for higher education institutions and activities, and may enter into contracts with persons, firms or corporations for the erection, improvement, repair, equipping and furnishing of such buildings and structures pursuant to Article XI-G of the Oregon Constitution and ORS 351.345. [Amended by 1963 c.573 §5; 1963 c.584 §2]

351.170 Charges for use of buildings; student building fee; disposition of receipts. (1) The board of higher education shall establish such rates, charges and fees for use of buildings, structures or projects referred to in ORS 351.160 (1), including revenue-producing buildings and structures already constructed, as, in the judgment of the board, will provide the required revenues to make the particular new building, project or structure self-liquidating and self-supporting, and as will provide the funds with which to amortize the principal of and pay the interest on the bonds issued to finance such buildings, structures or projects.

(2) The board shall charge and collect from each regular student a building fee at a rate not to exceed $12.50 for each regular term, for not less than three terms in each regular academic year, and not to exceed $18.75 if instruction is on a semester basis, or an equivalent rate of charge where instruction is on a different basis. The board is authorized to maintain adequate sinking funds for bonds outstanding. The fee shall be in addition to tuition and other fees charged to students and shall be deposited with the State Treasurer and credited to the appropriate subfund of the Higher Education Bond Sinking Fund. [Amended by 1963 c.638 §3; 1963 c.584 §3; 1975 c.331 §13]

351.180 Building insurance. The board of higher education may cause the buildings, structures or projects referred to in ORS 351.160 and 351.170 and the equipment and furnishings

therein and the appurtenances thereto to be insured against fire and other hazards in such sums as will protect the holders of the outstanding bonds issued to finance the cost thereof. Such insurance shall be in lieu of that afforded by the Restoration Fund, without right of insurers, in the event of loss, to subrogation to or contribution from said fund. [Amended by 1963 c.584 §4]

351.190 Acquisition of land for building purposes. The board of higher education may obtain, by donation, purchase, agreement or condemnation, the title to any land authorized to be acquired by ORS 351.345, 351.350 and 351.450. Condemnation proceedings instituted by the board shall be conducted in accordance with ORS chapter 35. [Amended by 1957 c.720 §1; 1963 c.548 §5; 1971 c.741 §25]

351.195 [1957 c.585 §1; 1969 c.349 §3; repealed by 1975 c.771 §33]

351.200 Board power over higher education curricula and departments. (1) The board of higher education shall visit the University of Oregon and Oregon State University for the purpose of inquiring as to the work offered and conducted at such institutions, whenever and as often as it may deem necessary. The board shall specifically determine from time to time as occasion may require what courses or departments, if any, shall not, in their judgment, be duplicated in the several higher educational institutions. The board may direct the elimination of duplicate work from any institution, and determine and define the courses of study and departments to be offered and conducted by each institution.

(2) A record of such determination shall be kept by the board in a book provided by the Secretary of State for that purpose. The board shall notify the Governor of such determination and each institution affected shall conform thereto.

(3) If any changes are made in the curricula of any institution, the change shall become effective at the beginning of the school year following the determination.

(4) Any person may appear before the board of higher education at any meeting for the purpose of laying before the board any data or arguments for the maintaining or elimination of any duplicated course or department.

351.203 Cooperation with Oregon Educational Coordinating Commission; compliance with certain commission decisions. (1) The State Board of Higher Education shall cooperate with the Oregon Educational Coordinating Commission in the development of a state comprehensive education plan including post-secondary education and in review of the board's programs and budget as provided in ORS 348.705 to 348.825.

(2) The board shall comply with the decisions of the commission regarding proposed new post-secondary programs and proposed new post-secondary locations determined by the commission to have a significantly adverse impact on one or more segments of education other than public institutions under the jurisdiction of the board. [1975 c.553 §12]

351.205 Interchange of faculty members with schools outside Oregon. The State Board of Higher Education may allow interchange of members of the faculties of institutions of higher learning with faculty members of comparable institutions of other states or countries for a period of one year. Such exchange service shall, for all purposes, be deemed continued service with the Oregon institution covered, with salary paid to the absent faculty member accordingly. Salary for the visiting faculty member shall not be paid by the Oregon institution covered. [1967 c.239 §1]

351.210 Disposition of unnecessary equipment. The board of higher education may sell or otherwise dispose of any worn out, obsolete or otherwise unsuitable equipment or material, the disposal of which would in the board's judgment be to the financial benefit of the institutions under the board's control. Before such disposal or sale, the board shall submit to the Department of General Services a proposal for such sale or disposal and shall secure from the department its formal approval thereof. The proceeds from any sales or disposals made pursuant to authority granted in this section shall be deposited in the State Treasury to the credit of the board of higher education and may be expended by it for any purpose authorized by law in the same manner as it is authorized to make other expenditures.

351.220 Acquisition of intellectual property. The State Board of Higher Education may acquire by gift or by purchase interests in intellectual property of any kind, whether patentable or copyrightable or not, including patents, copyrights, inventions, discoveries, processes and ideas. The board may also agree to aid in the development of property acquired pursuant to ORS 351.220 to 351.250 and to pay an assignor of any interest in intellectual property a share of any moneys received on account of the board's ownership or management of the property. [1963 c.332 §1]

351.230 Management, development and disposition of intellectual property. The State Board of Higher Education may manage, develop or dispose of by assignment, sale, lease, license or other action deemed advisable by the board, property acquired under ORS 351.220, and may contract with any person or agency, board, commission or department of this or any other state or with the Federal Government regarding the management, development or disposition thereof. The board may make gratuitous assignments of such property to any

trust or fund, the sole beneficiary of which is the State Board of Higher Education or any of the institutions or activities under its control, subject to the share, if any, agreed to be paid to the assignor. The board may reassign such property to the inventor, author or discoverer. [1953 c.332 §2]

351.240 Terms and conditions of transactions in intellectual property; dissemination of information. The State Board of Higher Education may determine the terms and conditions of any transaction authorized by ORS 351.220 to 351.250 and need not require competitive bids in connection therewith. No formal publicity or advertising is required regarding property for the development of which the board wishes to contract, but the board shall make reasonable efforts to disseminate such information in appropriate research and industrial circles. [1953 c.332 §4]

351.250 Disposition of revenue; Higher Education Invention Fund. Moneys received by the board as a result of ownership or management of property acquired under ORS 351.220 to 351.250 or of transactions regarding such property shall be credited to a special fund in the State Treasury separate and distinct from the General Fund to be designated "Higher Education Invention Fund" and shall only be applied by the State Board of Higher Education to payment of the agreed share, if any, to assignors, and for the advancement of research or for the acquisition and development of intellectual property, or both. [1953 c.332 §5]

351.260 Planning assistance. The State Board of Higher Education may establish and maintain planning facilities and undertake planning work for the provision of, or related to, local planning services and may:

(1) Upon the request of the governing body of any municipality, county, Indian reservation or of a regional or joint planning agency in the

state, provide planning assistance to such municipality, county, Indian reservation or planning agency (including surveys, land use studies, urban renewal plans, technical services and other planning work) and make or assist in making a study or report upon any planning problem of such municipality, county, Indian reservation or planning agency.

(2) Agree with such governing body or planning agency as to the amount to be paid to the board for such service.

(3) Apply for and accept grants from the Federal Government and other sources in connection with any such planning work.

(4) Contract with respect thereto. [1955 c.536 §1; 1965 c.456 §1]

FINANCES

351.305 Definition for ORS 351.310 to 351.540. As used in ORS 351.310 to 351.540, "board" means the State Board of Higher Education.

351.310 Board's general financial power; appropriation of moneys received by board. (1) The board of higher education shall control the use, distribution and disbursement of all funds, appropriations and taxes now or hereafter in possession, levied and collected, received or appropriated for the use, benefit, support and maintenance of institutions, departments or activities of higher education, including the authorization of individuals to sign vouchers for the disbursement of funds for the various institutions, departments and activities.

(2) All moneys, except moneys appropriated from the State Treasury for expenditure within a specified period of time, heretofore or hereafter received by or on behalf of the State Board of Higher Education, or any institution, department or activity under its control, which are not

otherwise appropriated by law, hereby are appropriated continuously to the State Board of Higher Education for the purposes for which such moneys were donated, granted or received, in accordance with any applicable law governing the use of such moneys. [Amended by 1955 c.84 §1]

351.320 Prorating expenses. The board of higher education may prorate all expenses not otherwise provided for, incurred under authority of ORS 351.040, 351.050, 351.090 to 351.110, 351.130 and 351.310 to the institutions under its control, and pay the same from the funds available for the general expenses of those institutions.

351.330 [Repealed by 1957 c.370 §1]

351.340 Use of moneys. All sums of money provided by law for the support and maintenance of institutions and activities of higher learning may be used for the payment of salaries of instructors and employes, current expenses, construction of additional buildings, purchase of lands, purchase of equipment, purchase of library books and periodicals, purchase of laboratory supplies and apparatus, making necessary repairs and, in general, for the payment of all such expenses connected with the management of such institutions and activities of higher learning, as the board may from time to time determine. However, such money in the instruction budget of the board shall not be used to support hobby or recreation courses. [Amended by 1957 c.370 §3; 1978 c.1 §3]

351.345 Bond issue for higher education and community college projects. In order to provide funds for the purposes specified in Article XI-G of the Oregon Constitution, bonds may be issued in accordance with the provisions of ORS 286.031 to 286.061. [1963 c.584 §1; 1981 c.660 §24]

351.350 Bond issue for self-liquidating higher education purposes. In order to provide funds for the purposes specified in Article XI-F(1), Oregon Constitution, bonds may be issued in accordance with the provisions of ORS 286.031 to 286.061. [Amended by 1955 c.88 §1; 1957 c.703 §1; 1959 c.127 §1; 1961 c.38 §1; 1963 c.10 §1; 1963 c.515 §1; 1967 c.404 §9; 1969 c.664 §8; 1971 c.709 §7; 1975 c.331 §11; 1981 c.539 §7; 1981 c.660 §25]

351.353 Construction of parking facilities; bonds. (1) The State Board of Higher Education may undertake the construction of an off-street motor vehicle parking facility in Portland, Oregon, for higher education pursuant to Article XI-F(1), Oregon Constitution, ORS 351.160 to 351.190, 351.350 to 351.460, 351.480 and 351.490. The parking facility shall be for the use of the students and staff members of the board. The board shall establish the rates, charges and fees for use of the parking facility in accordance with the provisions of ORS 351.170.

(2) Bonds may be sold to finance the facility described in this section, in an amount authorized and under the conditions prescribed by ORS 351.350. [1963 c.573 §2; 1967 c.67 §18; 1981 c.660 §26]

351.440 Sale to State of Oregon or United States Government. The bonds may be sold to the State of Oregon or to the United States Government without advertisement thereof for public sale. [Amended by 1957 c.703 §5; 1981 c.94 §31; 1981 c.660 §27]

351.450 Higher Education Bond Building Fund. The moneys realized from sales of bonds issued to construct, improve, repair, equip and furnish buildings and other structures for higher education, and to purchase and improve sites therefor shall be credited to a special fund in the State Treasury separate and distinct from the General Fund, to be designated Higher Education Bond Building Fund. In the

Higher Education Bond Building Fund there shall be a separate subfund for the credit of moneys realized from sales of bonds issued pursuant to Article XI-F(1) of the Oregon Constitution and ORS 351.350; and there shall be a separate subfund for the credit of moneys realized from sales of bonds issued pursuant to Article XI-G of the Oregon Constitution, and ORS 351.345. The moneys received from the issuance of temporary bonds under ORS 351.470 for the purpose of interim financing pending the sale of the bonds shall also be credited to the appropriate subfund of the Higher Education Bond Building Fund. The moneys in the fund hereby are appropriated to defray the costs of the projects to be financed through sale of the bonds and for the purpose of retiring temporary bonds issued under ORS 351.470, and shall not be used for any other purpose, except that such moneys may, with the approval of the State Treasurer, be invested until needed in obligations of the State of Oregon or of the United States Government, or both, having maturity dates of not to exceed two years. If a surplus remains after application to such purpose, the surplus, and earnings from temporary investments, shall be credited to the Higher Education Bond Sinking Fund by the appropriate subfund. [Amended by 1953 c.214 §2; 1957 c.703 §6; 1963 c.58 §6; 1981 c.660 §28]

351.460 Higher Education Bond Sinking Fund. (1) The board shall maintain with the State Treasurer, a Higher Education Bond Sinking Fund, separate and distinct from the General Fund. The Higher Education Bond Sinking Fund shall comprise two separate subfunds to provide for the payment of the principal of and the interest upon the bonds issued under authority of Article XI-F(1) of the Oregon Constitution and ORS 351.350, and under authority of Article XI-G of the Oregon Constitution and ORS 351.345. The moneys in said sinking fund hereby are appropriated for such purposes. The

said fund may be invested by the board in securities as defined in ORS 295.005 (7)(a), (c) and (d) and in Time Certificates of Deposit issued by a bank or trust company authorized to do business in this state in the capacity of a bank or trust company, and the earnings from such investments shall be credited to the appropriate subfunds of such fund.

(2) The Higher Education Bond Sinking Fund shall consist of all moneys received from ad valorem taxes levied pursuant to ORS 351.480, all moneys that the Legislative Assembly may provide in lieu of such taxes, all of the net revenues received from the projects or undertakings for the financing of which the bonds were issued, including gifts, grants and building fees, such unpledged revenues of buildings and projects of like character as shall be allocated by the board, all moneys received as accrued interest upon bonds sold, all earnings from investments of said fund and the proceeds of the sale of refunding bonds. Moneys credited to the Higher Education Bond Sinking Fund shall be credited to the appropriate subfunds of such fund.

(3) The board may credit the Higher Education Bond Sinking Fund with moneys received from either a sale or interfund transfer of land, buildings and facilities. Where such land, buildings or facilities are sold, or the use thereof is rededicated so that a transfer from one subfund to the other is appropriate, the moneys received shall be credited to the appropriate subfund.

(4) The board shall apply student building fees, revenues, gifts and grants for the payment of the principal of and the interest upon the bonds issued under authority of Article XI-F(1) of the Oregon Constitution and ORS 351.350 until such time as the proper subfund of said sinking fund and investments thereof, as supplemented by expected future income will, in the judgment of the board, be sufficient to meet in full the principal of and the interest upon all

such outstanding bonds. Income not thus required for the sinking fund shall be transferred to such other fund and account as the board shall designate.

(5) The said sinking fund shall not be used for any purpose other than those for which the fund was created; but should a balance remain therein after the purposes for which the fund was created have been fulfilled or after a reserve sufficient to meet all existing and future obligations and liabilities of the fund has been set aside, the surplus remaining may be transferred to such other fund as the board may designate.

[Amended by 1963 c.584 §7; 1969 c.513 §1; 1973 c.809 §1; 1981 c.660 §29]

351.470 Temporary bonds. Pending receipt of the proceeds from the expected sale of bonds under the provisions of ORS 351.345 to 351.460, to the State of Oregon or to the United States Government or any agency thereof, the State Board of Higher Education may, with the approval of the State Treasurer, procure interim financing from the State of Oregon, the United States Government or any agency thereof, or from any private lending agency, by issuing to such private or public lending agency temporary bonds, without advertisement of such bonds for sale, in order to finance temporarily building projects authorized by the board pursuant to Article XI-F(1) or Article XI-G of the Constitution of the State of Oregon and ORS 351.160 (1) or (2), if the bond issue to be temporarily financed by the issuance of temporary bonds has been authorized by the State Board of Higher Education and a purchase plan has been formulated with and is being considered by the State of Oregon or the United States Government or any agency thereof. The proceeds from the sale of the bonds shall be deposited in the Higher Education Bond Building Fund and credited to the appropriate subfund of such fund, and shall be used to retire the temporary bonds issued under this section. The principal amount of temporary bonds issued under this section shall

not exceed the principal amount of the bond issue for which a purchase plan has been formulated. The temporary bonds may be extended, renewed or refunded but maturity dates shall in no event be later than two years from the date of issue of the original temporary bonds for the related building project. [1957 c.703 §8; 1963 c.584 §8]

351.480 Tax levy for higher education purposes. Each year the Department of Revenue shall determine the amount of revenues or other funds that are available and the amount of taxes, if any, that should be levied in addition thereto, to meet the requirements of ORS 351.160 to 351.190, 351.345 to 351.460 and 351.480 to 351.500, for the ensuing fiscal year. Such additional amount shall be apportioned, certified to, and collected by the several counties of the state in the manner required by law for the apportionment, certification and collection of other ad valorem property taxes for state purposes. The amounts of ad valorem taxes levied under authority of this section shall be remitted in full by the several county treasurers to the State Treasurer in the manner and at the times prescribed by law and shall be credited by the State Treasurer to the appropriate subfund of the Higher Education Bond Sinking Fund. [Amended by 1963 c.584 §9]

351.490 Federal aid; donations; acceptance and use. The board may, in its discretion, accept financial assistance and grants, either in the form of money or labor, from the United States or any of its agencies, subject to the terms and conditions thereof, regardless of any laws of this state in conflict with the regulations of the Federal Government with respect thereto, and may also accept from others any donation or grant of land or gift of money or other valuable gift or thing, for any of the purposes contemplated by Article XI-F(1) and Article XI-G of the Oregon Constitution, ORS 351.160 to 351.190, 351.345 to 351.460 and 351.480 to 351.500. Unless enjoined by the terms or conditions of any such gift or grant, the board

may convert the same, or any of them, into money, through sale or disposal thereof. [Amended by 1963 c.584 §10]

351.500 Repealed statutes continued effective until bonds redeemed. Outstanding bonds issued under article 3, chapter 36, title 111, O.C.L.A., and chapter 41, title 111, O.C.L.A., shall continue to be valid obligations until they are redeemed in full, and authority granted in connection with said bonds shall continue in effect until they have been so redeemed.

351.510 [Amended by 1957 c.703 §7; 1963 c.584 §11; repealed by 1967 c.454 §119]

351.520 Borrowing money for purchase of real property. In carrying out the power and authority granted by ORS 351.140, the board of higher education may borrow money and notes, bonds or other evidences of indebtedness may be issued, secured by the pledge of the real property to be acquired and revenues, as provided in ORS 351.140. Such evidences of indebtedness shall be issued in accordance with the provisions of ORS 286.031 to 286.061. [Amended by 1981 c.880 §30]

351.530 Obligations under ORS 351.140 or 351.520 not indebtedness of state or board. No obligation of any kind incurred under ORS 351.140 or 351.520 shall be, or be considered, an indebtedness of the State of Oregon, or to create a general indebtedness of the board of higher education. Any contract of purchase, note or bond or other obligation issued by said board shall limit its payment to the property and income or revenues pledged to secure its payment.

351.540 Special checking account of board of higher education. (1) Unless otherwise provided by law or by federal order or regulation with respect to federal funds, the State Board of Higher Education, with the ap-

proval of the State Treasurer, may deposit with the State Treasurer any moneys coming into its hands. Moneys so deposited shall be credited by the State Treasurer to a special checking account.

(2) The special checking account may be used for the purpose of clearing items subject to subsequent debit or credit to state funds.

(3) Disbursements may be made by check or order of the board upon the State Treasurer, signed by such officer or administrative head as the board, by motion or resolution, nominates for that purpose. Disbursements shall be made only in payment of claims authorized by law for the ordinary expenditures of the State Board of Higher Education incurred in the operation of the state institutions of higher learning.

(4) Funds in the account established under subsection (1) of this section may be held as petty cash or carried with the State Treasurer in segregated subaccounts, to be disbursed in accordance with subsection (3) of this section. With the approval of the State Treasurer, petty cash funds may be deposited in banks for safekeeping purposes and disbursed therefrom in payment of claims authorized by law by employes of the board authorized by the disbursing officer. The board's duly designated disbursing officer from time to time shall reimburse the petty cash funds or subaccounts upon the presentation of satisfactory evidence of disbursements therefrom pursuant to law. [Amended by 1967 c.454 §31; 1979 c.479 §1]

351.545 Higher Education Isolation Facility Bond Sinking Fund. (1) The board shall maintain with the State Treasurer, a Higher Education Isolation Facility Bond Sinking Fund, separate and distinct from the General Fund. The Higher Education Isolation Facility Bond Sinking Fund shall provide for the pay-

ment of principal and interest of bonds issued under the authority of Article XI-F(1) of the Oregon Constitution and ORS 351.350 in an amount equal to the amount authorized for expenditure by paragraph (b) of subsection (2) of section 3, chapter 709, Oregon Laws 1971, and expended as provided therein. The sinking fund may be invested by the board in securities as defined in ORS 295.005 (7)(a), (c) and (d) and in Time Certificates of Deposit issued by a bank or trust company authorized to do business in this state in the capacity of a bank or trust company, and the earnings from such investments shall be credited to the sinking fund.

(2) The Higher Education Isolation Facility Bond Sinking Fund shall consist of moneys received as net revenues from the isolation facilities for which the expenditure of funds is authorized by paragraph (b) of subsection (2) of section 3, chapter 709, Oregon Laws 1971, including gifts, grants and building fees, moneys received as accrued interest on bonds sold, earnings from investments on the sinking fund, the proceeds of the sale of refunding bonds and any accrued interest on such refunding bonds, moneys received pursuant to ORS 462.280, moneys appropriated to the sinking fund by the Legislative Assembly and moneys received for the purposes of the sinking fund from all other sources. All moneys in the sinking fund are continuously appropriated to the board for the purposes provided in subsection (1) of this section. [1971 c.688 §3; 1973 c.809 §2; 1975 c.550 §13; 1977 c.281 §5; 1977 c.855 §19; 1981 c.660 §31]

351.550 [Repealed by 1979 c.479 §2]

351.555 Investment of undistributed bond funds. Whenever bonds are issued pursuant to the provisions of Article XI-G of the

Oregon Constitution, all undistributed bond funds and revenue received as payment, if invested, shall be invested to produce a yield less than the yield produced by arbitrage bonds as defined in subsection (d) of section 103 of the Internal Revenue Code of 1954. [1971 c.709 §13]

351.560 [Amended by 1967 c.255 §1; 1967 c.454 §32; 1971 c.80 §2; repealed by 1979 c.479 §2]

351.570 [1961 c.577 §2; 1965 c.585 §1; renumbered 348.010]

351.580 Use of federal funds for architectural and engineering planning. Notwithstanding any appropriations or moneys made available by law, and notwithstanding any other provision made for appropriations to the Department of Higher Education under chapter 404, Oregon Laws 1967, the State Board of Higher Education is authorized to undertake architectural and engineering planning with moneys provided from the Federal Government or from other sources. Such moneys, including reimbursement for planning, are continuously appropriated for planning purposes. [1967 c.404 §5]

351.590 Higher Education Athletic Fund. (1) The State Board of Higher Education shall maintain with the State Treasurer a separate fund known as the Higher Education Athletic Fund in which shall be deposited all intercollegiate athletic revenue from gate receipts, television royalties, and other sources related to intercollegiate athletic events.

(2) Disbursements from the fund, including any interest credited thereto, may be made for necessary expenses for supplies, services and equipment associated with the intercollegiate athletic program, including recruiting, training and grant-in-aid to intercollegiate athletes.

(3) The fund may be invested by the State Treasurer in securities which constitute legal investments as defined in ORS 295.005 (7). The earnings from such investments shall be credited to the fund. [1975 c.558 §7]

351.605 [Formerly 351.120; amended by 1961 c.558 §1; 1963 c.328 §1; renumbered 348.210]

351.610 [1963 c.539 §2; renumbered 348.220]

351.615 Higher Education Auxiliary Enterprise Building Repair and Equipment Replacement Fund. Moneys set aside by higher education auxiliary activities for repair and alteration of buildings and replacement of equipment shall be credited to a special fund in the State Treasury, separate and distinct from the General Fund, to be designated Higher Education Auxiliary Enterprise Building Repair and Equipment Replacement Fund. The fund may be invested by the State Treasurer in securities which constitute legal investments as defined in ORS 295.005 (7). The earnings from such investments will be credited to the fund for distribution to the several auxiliary activities in accord with rules to be adopted by the board. The moneys in the Higher Education Auxiliary Enterprise Building Repair and Equipment Replacement Fund are continuously appropriated for the repair and alteration of auxiliary enterprise buildings and replacement of equipment as designated by the board, after hearing any recommendations by recognized student governments. [1979 c.106 §2]

4. 1972 U.S. Code & Cong. Admin. News 2155

EDUCATIONAL INSTITUTION EMPLOYEES

The present Section 702 of Title VII exempts educational institutions employees connected with educational activities from the equal employment requirements. The bill removes this exemption (Section 3 of the bill).

There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees - primarily teachers - from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. In the field of higher education, the fact that black scholars have generally been relegated to all-black institutions, or have been restricted to lesser academic positions when they have been permitted entry into white institutions is common knowledge. Similarly, in the area of sex discrimination, women have long been invited to participate as students in the academic process, but without the prospect of gaining employment as serious scholars.

When they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than their male counterparts. In a study conducted by Theodore Kaplow and Reece J. McGee, it

determining the hiring of male faculty members were prestige and compatibility, but that women were generally considered to be outside of the prestige system altogether.[1]

The committee feels that discrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any area, tend to promote misconceptions leading to future patterns of discrimination. Accordingly, the committee feels that educational institutions, like other employers in the Nation, should report their activities to the Commission and should be subject to the provisions of the Act.

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[1] See generally, Kaplow and McGee, The Academic Marketplace, Anchor Edition (Garden City: 1965).

EDITOR'S NOTE

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87-195

Supreme Court, U.S.
FILED
JUL 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ANNA PENK, ET AL, Petitioner,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DON S. WILLNER
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Counsel of Record

July 28, 1987

VOLUME II

. Penk, et al, v. Oregon State Bod. of Higher Educ., 36 CCH Employment Practices Par. 35,049, partially reported.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ANNA PENK, ELAINE SPENCER, BERNICE GILMORE, MADRONNA HOLDEN, BETTY LEONARD, LOIS SCHREINER, G. JOANNE AMSPOKER, MARGARET LUMPKIN, and all others similarly situated,

Plaintiffs,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,

Defendant.

MARY H. DAVISON, ROSEMARY DUNN DALTON, POLLY ANN FISHER, LORRAINE B. FURBY, ANN L. HOFFSTETTER, MARGARET A. HUNTLEY, DIANNA L. KALE, SHERRY McLEOD MIHEL, MARY ANN PETRY, CAROL E. RATHE, JANE M. SIEGEL, BARBARA J. STEWART, RUTH WAUGH, MICHELE WOLLERT,

Intervenor-Plaintiffs.

No. 80-436 FR

United States District Court
District of Oregon

Don S. Willner
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Portland, Oregon 97258

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FRYE, Judge:

This case came on for trial before The Honorable Helen J. Frye on February 8, 1984. The plaintiffs were represented by Don S. Willner, lead counsel; JoAnn B. Reynolds and Kathleen Haley. The defendant was represented by David B. Frohnmayer, Attorney General for the State of Oregon. Appearing in court on the defendant's behalf were Assistant Attorneys General James J. Casby, Jr., lead counsel, (the Oregon State Board of Higher Education, Eastern Oregon State College, and Oregon State University); Pamela L. Abernethy, (Western Oregon State College and Oregon Health Sciences University); Jerome Lidz (University of Oregon, Southern Oregon State College and Oregon Institute of Technology); Special Assistant Attorney General Linda R. Rodgers (Portland State University and

statistical issues); and private counsel Mark S. Dichter and Lawrence B. Fine (statistical issues).

Approximately 95 witnesses testified on behalf of the plaintiffs and 125 witnesses testified on behalf of the defendant. Testimony ended on November 9, 1984. Closing arguments were held on November 20, 1984. In all, the court considered hundreds of pages of affidavits and depositions and thousands of exhibits. The transcript consists of approximately 25,000 pages.

INTRODUCTION

This is an action brought by 22 women faculty members against the Oregon State Board of Higher Education (the Board). Plaintiffs allege that the Board discriminated against them individually because of their sex in violation of 42 U.S.C. Sec. 2000e-2(a) (Title VII), which provides in part:

> It shall be an unlawful employment practice for an employer--
> (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex, . . . or
>
> (2) to limit, segregate, or classify his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex, ...

Plaintiffs seek money damages on their individual claims. Plaintiffs also

allege that the Board engages in a pattern or practice of sex discrimination against women faculty members as a class. Plaintiffs seek class-wide money damages on their class claims.

History of the Action

Plaintiffs filed this action on April 25, 1980. The court granted class certification on October 13, 1981. After the Supreme Court's decision in General Telephone Company of the Southwest v. Falcon, 457 U.S. 147 (1982), the Board moved for decertification of the class. The court denied this motion, noting that many of the same factual issues relevant to the named plaintiffs' cases were also relevant to the class certification issue. The court advised the parties that certification of the class was conditional and subject to alteration at

any time before a final decision on the merits. Discovery continued, and trial commenced on February 8, 1984. At the close of plaintiffs' cases, the Board filed motions pursuant to Fed. R. Civ. P.41(b). These included motions (1)to dismiss the individual and class claims for failure to prove prima facie cases; (2)to dismiss plaintiffs' disparate impact claims; (3)to decertify the class action; and (4)to dismiss plaintiffs' "comparable worth" type claims.

Since Rule 41(b) gives to a court the discretion to deny a motion to dismiss for failure to prove a prima facie case, even though the motion could be granted, the court exercised this discretion and denied in its entirety the Board's motions to dismiss plaintiffs' individual and class claims for failure to make prima facie cases. However, the

court granted the Board's motion to dismiss plaintiffs' disparate impact claims on a number of grounds, including failure of proof. The court also ruled that the Ninth Circuit decision, Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984), precluded plaintiffs' comparable worth claims. Finally, the court granted, in part, the Board's motion to decertify the class, thereby limiting the class to "regular teaching faculty." In granting, in part, the Board's motion to decertify the class, the court also ruled that excluded subgroups did not meet the requirements of Fed. R. Civ.P.23 and hence could not be certified as subclasses.[1]

What remains for decision are twenty-two individual disparate treatment actions, and a "pattern or

practice" disparate treatment class action composed of all female regular teaching faculty employed at .5 "full-time equivalent" (FTE) [2] or greater on or after July 21, 1979. Before evaluating and deciding these claims the court will briefly summarize the nature of the Oregon State Board of Higher Education and the eight institutions of higher education.

Oregon State Board of Higher Education

The Oregon State Board of Higher Education is a body of eleven individuals, including two students, appointed by the Governor of the State of Oregon and confirmed by the Oregon State Senate. The Board has the authority from the Oregon State Legislature to exercise a wide range of power over the State's institutions of higher education. However, the authority

is per missive rather than mandatory. The Board appoints a chancellor, who is the Board's chief executive officer. The chancellor and his staff are responsible for a wide range of administrative duties. The presidents of the eight institutions are appointed by the Board and serve at its pleasure. The presidents have been delegated full authority and responsibility for administering the affairs of the institutions, including the responsibility for making all of the personnel determinations at issue in this case.

The Board has almost no involvement in rank, pay, promotion, and tenure decisions at any institution. While the Board could retain control over these matters if it so desired, it has delegated them to the chancellor and the

presidents of the institutions. The Board sets policy and rules by which personnel decisions are made in the institutions. For example, the Board's administrative rules specify what ranks shall exist at the institutions and give general guidelines for conditions of service for faculty members. The rules also specify general guidelines for faculty evaluations. These are applied on an institutional and departmental basis in light of the institutional and departmental missions. Although the Board's rules have an impact on an individual faculty member's promotion from assistant to associate professor in that the Board has set up the rank structure and laid out a general evaluation scheme, whether an individual is discriminated against in violation of Title VII turns on decisions made or

actions taken at the institutional or departmental level.

A faculty member can appeal a non-disciplinary personnel decision to the Board, although in such a case the Board's review is not de novo. Such appeals are almost never taken. None of the named plaintiffs or class member witnesses in this case availed themselves of this appeal right.

Although the court will not detail the history and missions of the individual institutions as extensively as it could, given the massive record submitted by the Board, some brief description of the diversity of the eight institutions is necessary.

Western Oregon State College in Monmouth, Eastern Oregon State College in LaGrande, and Southern Oregon State College in Ashland were historically

teachers' colleges. At present, the education of teachers remains the primary mission at Western Oregon State College, and it is an important part of the mission of Eastern Oregon State College. Southern Oregon State College is developing into a regional undergraduate liberal arts college, as has Eastern Oregon State College to a lesser extent. The missions of these three schools is primarily education -- that is, to teach and train students. Faculty members are expected to stay current on developments in their particular disciplines. The scholarly activities or professional growth expected of faculty at these schools is designed to insure that faculty do stay current in their fields of expertise. In some departments, however, research for the sake of research may be required for increases

in salary and promotions in rank.

The University of Oregon in Eugene and Oregon State University in Corvallis are the state's two major research universities. Both institutions offer a wide range of undergraduate and graduate programs, although the institutions have different subject matter emphases. Research and publication are important parts of a faculty member's work at these institutions. The extent and quality of research and publication are major determinants in employment decisions made at the University of Oregon and Oregon State University.

Portland State University in Portland is a hybrid between a regional undergraduate liberal arts college and a major research university. It originated after World War II to provide educational opportunities to returning

veterans. Portland State University has grown into the state's "urban" university. Since the early 1970's, Portland State University has attempted to upgrade its status from a regional liberal arts college to a major research university. Faculty members are increasingly expected to have higher academic credentials and to engage in research and publication.

Oregon Institute of Technology in Klamath Falls is the state's polytechnic college. It's mission is to educate and to train students in mechanical and technological skills. Academic credentials of faculty are often valued less than relevant industrial experience. Teaching is stressed. Faculty at Oregon Institute of Technology must keep current in their areas of expertise, but do not

ordinarily engage in extensive research or publication.

The Oregon Health Sciences University in Portland is concerned with education and research in the health care area. It is a major research institution as well as a training school. Originally a part of the University of Oregon, the Oregon Health Sciences University became a university in its own right in the 1970's. Within Oregon Health Sciences University are three relatively autonomous and separate schools: the School of Medicine, the School of Dentistry, and the School of Nursing. The faculty at Oregon Health Sciences University are more heterogenous than the faculty at the other institutions. Some faculty members are exclusively researchers and are valued substantially for their ability to obtain research

grant funds from outside the institution. Others are teachers and practitioners, earning part of their salary from their medical, dental, or nursing practices. Some are primarily teachers doing little or no research or practice. All must remain current in their field of expertise.

The diversity among the institutions is obvious. The institutions are geographically removed from one another and have distinct missions and functions. The Board's decision to delegate substantial authority to the institutions is reasonable. With respect to the employment decisions at issue in this case, the institutions are in a better position than the Board to determine how well an individual is contributing to the particular mission of that institution.

The court will now consider the rules of law applicable to the named plaintiffs' claims.

Introduction Footnotes

1. Even if the class as originally certified remained involved in this decision, the result in the class claim would not be different.

2. The FTE of an academic position in the Oregon system represents the extent to which a position is full-time or part- time. For example, a position with a FTE of .75 is a "three-quarter time" position.

LAW APPLICABLE TO THE NAMED PLAINTIFFS' CLAIMS

The method of analyzing an individual disparate treatment claim is set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a Title VII case involving racial discrimination in hiring. The Court states that the first step a plaintiff must take is to make a prima facie showing of discrimination:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing
>
> (i) that he belongs to a racial minority;
> (ii) that he applied for and was qualified for a job for which the employer was seeking applicants;
> (iii) that, despite his qualifications, he was rejected; and
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. McDonnell Douglas is a hiring case, but the Court indicates that the same sort of process should be used in determining whether a prima facie case has been made when other employment decisions are involved. See, e.g., Lynn v. Regents of the University of California, 656 F. 2d 1337 (9th Cir. 1981), cert denied 459 U.S. 823 (1982).

In this case, the McDonnell Douglas formula requires each named plaintiff to prove that (1) she is qualified for a "better" employment condition (more pay, a promotion, etc.), (2)she is not getting the better employment condition, and (3)others of similar qualifications are getting the "better" condition. The burden of establishing a prima facie case of disparate treatment is not onerous. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

When a prima facie case has been established by a plaintiff, an inference arises that the employer unlawfully discriminated against the plaintiff; if the employer at this point does no more, the plaintiff will prevail. Id. at 254. The employer must "articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802. Later cases have indicated that this language means what it literally says; that is, the employer need not persuade the court at this time that its decision was based on legitimate, non-discriminatory grounds; it must only produce evidence of legitimate, nondiscriminatory reasons for its actions:

> The defendant need not persuade the court that it was actually motivated by the proffered reasons. See [Board of Trustees v. Sweeney, 439 U.S. 24, 25]. It is sufficient

> if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.

Burdine, 450 U.S. at 254-55.

If the employer is able to articulate some legitimate, non-discriminatory reasons for its actions, a plaintiff may still prevail by showing that the defendant's stated reasons are in fact pretextual. McDonnell Douglas, 411 U.S. at 806. In this last stage,

> plaintiff retains the burden of persuasion. She must now have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. at 256. Pretext may be proved in many ways. A plaintiff may

show that a seemingly legitimate, non-discriminatory criterion is in fact applied only in cases involving members of protected classes. Evidence of a defendant's general policy and practice with respect to members of protected classes may show pretext. A plaintiff may also show that a defendant's purported reasons were not advanced until after the fact.

The three-step approach outlined above is a procedural method of arriving at the ultimate factual question: Did an employer treat an employee less well than other employees because of discrimination. The Supreme Court recently reaffirmed this approach, indicating that where, as here, a defendant has failed to persuade the court to dismiss the action for lack of a prima facie case and where, as here, a

defendant has responded to plaintiff's attempt to establish a prima facie case by presenting evidence of why plaintiff was treated differently, the McDonnell Douglas/Burdine scheme need not be applied rigidly because the court has all of the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff.

> But when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption "drops from the case," 450 U.S., at 255, n. 10, and "the factual inquiry proceeds to a new level of specificity."
> . . .
>
> The "factual inquiry" in a Title VII case is "[whether] the defendant intentionally discriminated against the plaintiff." Burdine, supra, at 253. In other words, is "the employer . .

> . treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), quoting Teamsters v. United States, 431 U.S. 324, 335, n. 15 (1977). The prima facie case method established in McDonnell Douglas was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Furnco, supra, at 577. Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether "the defendant intentionally discriminated against the plaintiff."

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715-16 (1983).

In every individual case presented to the court by the plaintiffs, the Board has come forward with evidence

purporting to show that differences in treatment between female plaintiffs and their male comparators are due to legitimate, non-discriminatory reasons. Whether the court thinks of the issue in terms of whether the proffered reasons are pretextual (McDonnell Douglas Burdine), or examines the evidence in light of the ultimate issue of whether the Board intentionally discriminated against the individual plaintiff because of her sex (United States Postal Service Board of Governors v. Aiken), the underlying factual issue is the same: Which explanation of the Board's actions does the court believe?

Before proceeding to the named plaintiffs' claims, the court will address the issue of the statute of limitations and the "continuing violation" rule.

The Statute of Limitations and the "Continuing Violation" Rule

For purposes of the class claim and the intervenor plaintiffs who did not file charges with the EEOC or the Oregon Bureau of Labor, the present lawsuit only involves allegedly discriminatory actions occurring after July 21, 1979. See Order of December 16, 1981. The federal statute does, however, allow a court to award back pay to a plaintiff for two years prior to the time of the filing with the Equal Employment Opportunity Commissioner (EEOC) if the plaintiff prevails.

The Board contends that it cannot be held liable for illegal discriminatory actions that took place prior to July 21, 1979, because such actions are time-barred. The Board relies on Delaware State College v. Ricks, 449 U.S. 250

(1980), and United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977). Evans involves a woman who failed to file a charge with the EEOC after a discriminatory discharge. Some years later she was rehired, but under the terms of the collective bargaining agreement she received no seniority credit for her pre-discharge work. The issue was whether the employer was committing a second Title VII violation by not crediting her for her prior work. The Court answered in the negative:

> Respondent [the woman] is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United [the employer] was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by Sec. 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may

constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

Respondent emphasizes the fact that she has alleged a continuing violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists. She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason. In short, the system is neutral in its operation. 431 U.S. at 558 (footnote omitted). (emphasis in original).

In Ricks, 449 U.S. at 252, a black man from Liberia alleged that he was denied tenure because of his national origin; however, he did not file a charge with the EEOC within the statutory time period after notification

of the tenure denial. Because of the denial of tenure, he was given a one-year terminal contract and, upon the contract's expiration, he was terminated. He then timely filed a charge with the EEOC. The court held, however, that his complaint was time-barred:

> Determining the timeliness of Ricks' EEOC complaint, and this ensuing lawsuit, requires us to identify precisely the "unlawful employment practice" of which he complains. Ricks now insists that discrimination motivat[ed] the College not only in denying him tenure, but also in terminating his employment on June 30, 1975. Tr. of Oral Arg. 25, 26, 31-32. In effect, he is claiming a "continuing violation" of the civil rights laws with the result that the limitations periods did not commence to run until his 1-year "terminal" contract expired. This argument cannot be squared with the allegations of the complaint. Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination. If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the

time of, the actual termination of his employment. But the complaint alleges no such facts.

Indeed, the contrary is true. It appears that termination of employment at Delaware State is a delayed, but inevitable, consequence of the denial of tenure. In order for the limitations periods to commence with the date of discharge, Ricks would have had to allege and prove that the manner in which his employment was terminated differed discriminatorily from the manner in which the College terminated other professors who also had been denied tenure. But no suggestion has been made that Ricks was treated differently from other unsuccessful tenure aspirants. Rather, in accord with the College's practice, Ricks was offered a 1-year "terminal" contract, with explicit notice that his employment would end upon its expiration.

In sum, the only alleged discrimination occurred-- and the filing limitations periods therefore commenced-- at the time the tenure decision was made and communicated to Ricks. That is so even though one of the effects of the denial of tenure--the eventual loss of a teaching position--did not occur until later. The Court of Appeals for the Ninth Circuit correctly held, in a similar tenure case, that "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences

> of the acts became most painful." It is simply insufficient for Ricks to allege that his termination "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." The emphasis is not upon the effects of earlier employment decisions; rather, it "is [upon] whether any present violation exists."

449 U.S. at 257-58 (footnote, citations omitted). (emphasis in original).

The issue is how to distinguish between a continuing violation and the continuing effects of a past, time-barred violation. For example, if a plaintiff was hired at a discriminatorily low salary in 1 5 and did not file an EEOC charge, it may well be that her pay will be lower than equally qualified males performing substantially the same job as she performs in the relevant time period. The Board argues that if each year her salary is set according to a formula (such as an across-the-board

percentage increase) applied nondiscriminatorily in each year,[1] then no continuing violation exists in the later years, and hence that her salary claims for those later years are not actionable. However, the evidence in this case does not support such a simple hypothetical. The evidence shows that, although a faculty member's starting salary and across-the-board increases are important, equity and merit raises also cause significant adjustments in salary level. It follows that, in any given year, if a male and a female faculty member are equally qualified in every relevant respect and are performing substantially similar work, then it is a present violation of Title VII for the institution to pay the woman less than the man. See Lamphere v. Brown University, 685 F.2d 743, 747 (1st Cir.

1982).

Rank and tenure matters are different. Unlike salary evaluations, which the evidence indicates occur annually, promotion or tenure evaluations and decisions are made at discreet, infrequent points in time at most institutions. For example, if prior to 1972 (when Title VII became applicable to the Board) or prior to the limitations period, the Board discriminated against women in promotions, and if after either period the Board made promotion decisions in an entirely nondiscriminatory way, plaintiffs' statistics would still show rank distributions adverse to women. Plaintiffs seem to argue that the Board is violating Title VII by not rearranging present rank distributions at the institutions to reflect the rank distributions as they would have been

had discrimination never occurred. However, rank distributions which are adverse to women and which are caused by time-barred discriminatory decisions rather than by an ongoing pattern or practice of discrimination are not actionable in this case. Even the cases relied upon by plaintiffs support this view. In Reed v. Lockheed Aircraft, 613 F.2d 757 (9th Cir. 1980), quoted extensively by plaintiffs in their trial memo, the Ninth Circuit emphasized the distinction made above:

> For the purposes of this action, then, the critical question is whether Lockheed, within 300 days of Reed's filing her charge, engaged in the unlawful conduct of failing to promote women in situations where men would be promoted. The Evans decision held merely that continuing impact from past violations is not actionable. Continuing violations are.

Id. at 760. (emphasis in original). This same distinction was expressed by

the court in another case relied upon by plaintiffs, Williams v. Owens-Illinois, 665 F.2d 918 (9th Cir. 1982), cert. denied 459 U.S. 971 (1982):

> . . . the relevant strain of continuing violation doctrine is that a systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. Id at 585-86. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions. A minority employee who is not promoted in 1973, for example, and is subject to a continuing policy against promotion of minorities, may then file a timely charge in 1976, because the policy against promoting him or her continued to violate the employee's rights up to the time the charge was filed.
>
> . . .
>
> The trial court erred, however, in concluding that the continuing violations doctrine did not apply to discriminatory placements or denials of promotions. It should not have

> barred consideration of such events that may have occurred prior to the limitations period. The reason is that appellants were entitled to base claims on such discriminatory acts if they could show that these acts continued as violations because the supporting discriminatory policy carried forward into the limitations period and had its effect on employees. This opportunity to prove a continuing violation must be provided, of course, whether the claim is race or gender discrimination.

665 F.2d at 924, (emphasis added).

As to promotion and tenure, the court concludes that in order to prevail, plaintiffs must show that the Board has engaged in a continuing pattern or practice of discrimination or that the Board in individual cases acted discriminatorily against women in decisions made within the relevant time period, or that within the relevant time period women were discriminatorily not considered for promotion or tenure. It is insufficient to show only that the

rank and tenure distribution of men and women differed within the relevant time period, because that distribution may reflect decisions made before the relevant time period that are not actionable in this case.[2]

The court will now make Findings of Fact and Conclusions of Law with respect to the cases of the named plaintiffs. The court will consider the named plaintiffs in alphabetical order within each of the institutions in the following order: Eastern Oregon State College, Western Oregon State College, Southern Oregon State College, Oregon Institute of Technology, Portland State University, University of Oregon, Oregon State University, and Oregon Health Sciences University.

Individual Claims Footnotes

1. The court has ruled in its Opinion and Orders of August 10, 1984 and September 13, 1984 that the across-the-board percentage raise system, to the extent it exists in the Oregon State System of Higher Education, has not been proved by plain tiffs to constitute a violation of TitleVII under a disparate impact theory.

2. It does not appear from the evidence that the overall pattern of tenure or promotion decisions changed drastically on July 21, 1979; hence, plaintiffs' "snapshot" regression analyses of rank and tenure distribution are relevant.

EASTERN OREGON STATE COLLEGE

LAGRANDE, OREGON

Dr. Mary H. Davison

Carol E. Rathe

DR. MARY H. DAVISON

Dr. Mary H. Davison, a professor of history at Eastern Oregon State College (EOSC), claims that she was discriminated against because of her sex in that she was denied sabbatical leaves in 1979 and in 1981. Dr. Davison intervened in this action as a named plaintiff without filing a charge of discrimination with the Equal Employment Opportunity Commission.

Dr. Davison was first employed at EOSC in 1957. At that time she had three degrees, all from the University of California, Los Angeles: a B.A. degree obtained in 1947; an M.A. degree obtained in 1949; and a Ph.D. degree obtained in 1953. From 1951 to 1956 she served as an Information and Education Officer in the United States Air Force.

In 1956, just prior to coming to EOSC, she was employed by the Seattle Public School System.

Dr. Davison has administrative as well as teaching talents and skills. Prior to 1974 she served as director of the General Studies Program, and thereafter, and until 1979, she was chair of the Social Science in Business Division. In 1969 she was responsible for a workshop in social science held on the EOSC campus, and in 1979 she received a monetary award from the Freedom Foundation for excellence in economic education. She has also received other local appointments and honors.

SABBATICAL LEAVE CLAIM - 1979

Sometime in 1977 or 1978, after deciding to give up her administrative responsibilities and to return to full-

time teaching, Dr. Davison applied for a sabbatical leave for the spring term of 1979.[1] A sabbatical leave is an educational leave, ordinarily with all or a portion of salary continuing to be paid, the purpose of which is to allow faculty members to do additional research, reading, writing, traveling, curriculum planning, etc. Sabbatical leaves must be approved at the institutional level and ultimately by the chancellor of the Oregon State System of Higher Education. Sabbatical leaves always have budgetary and planning implications.

Unlike most sabbatical leaves, Dr. Davison's sabbatical leave was a negotiated leave. Dr. Davison wanted to take a one- term sabbatical leave because one-term sabbatical leaves were taken with full pay. EOSC President

Rodney Briggs, for budgetary reasons, wanted Dr. Davison to take a full year sabbatical leave because full year sabbatical leaves were leaves with half pay.

It was finally agreed that President Briggs would recommend to the chancellor a one-term sabbatical leave with full pay for Dr. Davison. This recommendation was approved by the chancellor in early 1978 to take effect in the spring of 1979. Unfortunately, the budget for the spring of 1979 had not yet been finalized when this recommendation was approved. This portion of Dr. Davison's sex discrimination claim arises out of the budget "crunch" that befell EOSC shortly thereafter.

Budget problems at EOSC of heretofore unknown dimensions resulted in a series of faculty terminations

(including some tenured faculty) in June, 1978. As a result, Dr. Briggs again asked Dr. Davison to take a full year's sabbatical with half pay. (EOSC would save one-half of a twelve month salary; Dr. Davison would lose one-half of a twelve month salary) instead of the one-term sabbatical (EOSC would not save any salary; Dr. Davison would not lose any salary) which had been agreed upon and approved. Talks - sometimes heated talks - between Dr. Briggs and Dr. Davison continued. A compromise, suggested by Dr. Davison, was finally wrought: Dr. Davison would take a one-term sabbatical leave without pay (EOSC would save one-third of a nine-month salary; Dr. Davison would lose three months' salary).[2] Dr. Davison testified as follows:

Q (by Mr. Casby) Now, is it not true that in June 1978 there were a series of terminations of faculty, some including a tenured faculty at Eastern Oregon and responsive program reduction?

A Yes.

Q And is it not true that you're -- the rescinding of the sabbatical which had already been approved by Dr. Briggs was in response to the needs created by the budget reduction and by the program reduction?

A Well, he told me he would enjoy using my salary, yes.

Q Was there not a reduction within the history area where you were?

A One member was dropped, yes.

Q And that's the area where you do teach; is that not so?

A That's correct.

Q So instead, as I understand your affidavit, what you got or used was a leave without pay for a quarter?

A Correct.

Q And the difference in terms of your salary is that whereas

in the quarter sabbatical you would be paid full salary, under the leave without pay, you were not paid anything in terms of salary for that quarter; is that so?

A That's correct.

Q Now is it not correct that the leave without pay was your idea?

A I would suggest it perhaps was.

Q And the result was that you used the time that you would have used for your sabbatical in connection with the leave without pay?

A That's correct.

Q And you had an option at that time to take a full year's sabbatical or to do as you had also suggested, take the quarter leave without pay?

A Correct.

(Tr. 8469-8471).

Dr. Davison claims that male faculty members were allowed regular sabbatical leaves during that same period of time. The faculty members who were allowed

sabbatical leaves during or near the time that Dr. Davison took her leave without pay in the spring of 1979 are listed as follows in Def. Ex. 6311:

Howard Anderson:
6/15/79-9/15/79 Sabbatical
Lois Barry:
12/16/78-6/15/79 Sabbatical
Mary Davison
3/16/79-6/15/79 Leave Without Pay
Conrade Head:
9/16/78-6/15/79 Sabbatical
Leen Inghels:
9/16/78-6/15/79 Sabbatical
Lee Insko:
3/16/79-6/15/79 Sabbatical
Dwight Lippe:
3/15/79-6/16/79 Sabbatical
Mary Jane Loso:
7/1/78-7/1/79 Sabbatical
Lyle Schwarz:
3/16/79-6/15/79 Sabbatical
Felipe Veloz:
1/3/79-3/17/79 Leave from EOSC appointed at Guadalajara, Mexico.

The court has no substantial evidence regarding the circumstances of these individuals or their sabbatical leaves, but it is clear that two of those who received sabbatical leaves are women - Lois Barry and Mary Jane Loso.

The factual issue is: Was Dr. Davison discriminated against because of her sex in 1978-79 with regard to her request for sabbatical leave? The answer is, No. Dr. Davison was a long-time respected EOSC administrator and teacher whose plans for a sabbatical leave in 1979 were partially aborted by the State of Oregon's economic problems. In a spirit of compromise, she and EOSC worked out their differences. Dr. Davison cannot prevail upon her first claim.

SABBATICAL LEAVE CLAIM - 1981

In 1980 Dr. Davison again applied for a one-term sabbatical leave for the period of time between September 15, 1981 and January 1, 1982. She wished to update and do some additional research and reading for a variety of courses which she was teaching.

Before that application was acted upon, Dean of Academic Affairs, David Gilbert, issued a memorandum on March 6, 1981, advising deans of the two schools at EOSC as follows: (a)all requests for sabbatical leaves shall go through the personnel committee, and (b)sabbatical leaves of one or two terms are "discouraged," but "schedule-outs" may be granted in lieu of sabbatical leaves of one or two terms. Dr. Davison testified as to what a "schedule-out" means.

> Q (by Mr.Casby) So that when you get scheduled out, I wonder if you could describe to us what that means?
>
> A Well, it relieved me of formal teaching assignments. It did not relieve me of the responsibility of being on campus periodically, and it did not relieve me of responsibility to students that I advise or might have continuation of work with through reading and conference.

(Tr. 8473).

Dr. Davison's request for a one-term sabbatical was denied, but she was offered a "schedule-out" with full pay pursuant to Dr. Gilbert's new policy. She accepted the "schedule-out" for fall term 1981. That "schedule-out" did not affect Dr. Davison's right to apply for a full 12-month sabbatical leave later if she chose. During this one-term "schedule-out," Dr. Davison did not teach; she had six consecutive weeks for travel; she completed the work she had intended to complete when she sought the sabbatical leave; and she received full pay. She did, however, continue student advising and committee work during this time.

Dr. Davison claims she was discriminated against because of her sex in that the next year, Ray Stinnett, a

male, was granted a one-term "schedule-out" and a two-term sabbatical leave, contrary to the March 6, 1981 policy statement of Dean Gilbert. The evidence before the court regarding Dr. Stinnett is sketchy and con fusing. On direct examination Dr. Gilbert testified as follows:

> Q (by Mr. Casby) Were any men treated differently after that period of time?
>
> A In one case we okayed a two-term sabbatical for a male, but we were able to couple with it the ability the first term, fall term to schedule out fall term and then followed by a two-term sabbatical which really amounted to a full year sabbatical, so in that case we made an exception and that had to do with that faculty member needing at a very tight time frame to get licensure. He made a very strong argument that it was then or never, and it was a case that we talked about earlier, Dr. Stinnett was under litigation and -- and it was an attempt by the institution to bring him up to speed.

Q With that exception, were there any -- well, were there any other exceptions since that one?

A No.

(Tr. 13,148).

On cross-examination Dr. Gilbert testified as follows:

Q (by Mr. Willner) Are you saying Dr. Stinnett negotiated better than Mary Davison? Is that what you're saying?

A There is no relationship whatsoever. We were dealing with a -- with a very serious personnel issue involved with litigation and some other things and in Mary Davison's case we were not dealing with a serious personnel issue nor were we dealing with litigation.

Q All right. Would she have done better if she'd sued you?

A Who knows.

Q Is the basis upon which Eastern Oregon State College makes recommendations on sabbatical to the chancellor based on how strong a faculty member negotiates or is it

based on some kind of standard universally applied to all faculty members.

A You're taking an extreme exception. We hardly ever negotiate with faculty members on sabbaticals. It's a rare -- it's a rare thing. It does happen sometimes when there's a budget problem or if we don't believe that the request for the sabbatical is appropriate for some other reason, then there certainly are discussions.

(Tr. 13,335).

On redirect examination Dr. Gilbert testified as follows:

Q (by Mr. Casby) I'd, just to be sure I understand, so the record's clear, I'd like you to describe to us whether or not there is any comparison in the considerations that led to Dr. Stinnett getting the two terms of sabbatical in 1983-84 and Dr. Davison getting a schedule out rather than a one-term sabbatical in 1982?

A Is there any comparison?

Q Yes.

A Not at all.

Q And would you explain your answer, please?

A We -- we had very, very different circumstances. Dr. Davison was requesting a one-term sabbatical to work on some courses and it was suggested to her that a schedule-out would be much more appropriate and there was a discussion about how that would finally work, what she would do during the schedule-out, what she would not do and it was approved.

And in Dr. Stinnett's situation we were dealing with a very serious personnel issue. And we needed -- we and he needed to get some licensure and some updating and so on and so forth.

Q I guess that really doesn't hit the point that I was thinking about and that is why, then, does he get what Dr. Davison got but then an additional two-term sabbatical?

First of all, did she apply for that?

A Say that again.

Q Did she apply for that?

A Did she apply for that, no.

Q What Dr. Stinnett got.

A No, not at all. She applied for a one-term sabbatical and then there were subsequent discussions with either Dr. Young or Dr. Cobb or perhaps both.

Q Okay. Then comparing the two at that time, why does Dr. Stinnett get the two-term sabbatical and Dr. Davison not? In addition to the fact that she did not apply for it.

A Well, we -- we would have been very happy to give Dr. Stinnett a three-term sabbatical. That's what we wanted to do. That's what he wanted to do. That's what he asked for.

Q In other words, a full year?

A A full year. The problem was he didn't qualify 2 until winter term. So what we did was in effect give him a three-term sabbatical by -- in fact, it was a very unique kind of schedule-out because it cost us some money. We had to hire a replacement in effect because it was very much to our advantage to have him gone that particular year.

Now, if we had waited until the following year he would have qualified for a

> three-term sabbatical, but because of the unusual nature of the personnel situation, we needed to have him go three terms at that time because he had advised us that the rules were changing in terms of the licensure issue and that this was really the last practical chance to - he'd have licensure so we were under a very extraordinary situation.
>
> We didn't like it at all.

(Tr. 13,373-375)

It appears to the court that EOSC and Dr. Stinnett were involved in litigation between each other; that Dr. Stinnett had a "licensure" problem and needed to be "updated"; and that the college needed to allow him to take three terms away from the college in order to resolve these problems. If Dr. Stinnett had been entitled to a three-term sabbatical, there would be no issue in this case. He would have taken the three-term sabbatical which would have

been in compliance with Dr. Gilbert's letter of March 6, 1981. Since Dr. Stinnett was not entitled to a three-term sabbatical, the college decided to allow him to take a one- term "schedule-out" and a two term sabbatical, for which he was eligible, but which was "discouraged" by the memorandum of March 6, 1981.

The issues are: (1) Was Dr. Davison, because she was a woman, required to take a schedule-out in September, 1981, when she requested and was eligible for a one-term sabbatical leave? (2) Was Dr. Stinnett, because he was a man, allowed to take a two-term sabbatical leave when the March 8, 1981 letter strongly urged that two-term sabbatical leaves not be allowed?

The answer is "no" to both questions. Dr. Davison was a long-time

respected EOSC member and teacher whose plans for a one-term sabbatical in 1981 conflicted with a new policy advising against one-term sabbaticals. This new plan was based upon budgetary considerations and the desire of the administration that faculty members leave the Eastern Oregon environment during their sabbatical leaves.[3] Dr. Davison was not denied a one-term sabbatical leave because she is a woman. On the other hand, Dr. Stinnett was an EOSC staff member who had problems (the need for immediate licensure) and who "caused" problems (apparently he had sued EOSC). In order to resolve Dr. Stinnett's problems and their own problems, EOSC administrators "waived" the March 8, 1981 rule. As a personnel decision, the "waiver" may have been a good decision. As a personnel decision,

it may have been a bad decision. But whatever it was, it was not a decision based upon the fact that Dr. Stinnett is a man.

Dr. Davison cannot prevail on her second claim of discrimination.

Davison Footnotes

1. There are two basic requirements set out in the Oregon Administrative rules for sabbatical leave. First, the applicant must show that he or she is "capable of using [the sabbatical period] in a manner which will provide greater service to the institution and to the state." OAR 580-21-200(1). Second, a faculty member is ordinarily only eligible for sabbatical leave after completion of a specified number of years of service, usually six continuous full-time years at the rank of instructor or above. OAR 580-21-205.

2. Part of the deal negotiated between EOSC and Dr. Davison involved the timing of Dr. Davison's change from an administrative to a teaching position. By having the change take place before the proposed sabbatical leave, Dr. Davison's salary during the sabbatical leave would be a nine-month salary rather than the twelve-month salary she had received as an administrator.

3. Different and broader cultural and intellectual opportunities are afforded faculty members when they leave the environment of their own campus and study or travel elsewhere. A change of environment is often precluded by a one-term sabbatical leave.

CAROL E. RATHE

Carol E. Rathe, a music teacher in the Lincoln County Public Schools, Waldport, Oregon, claims that she was discriminated against on the basis of her sex while serving as a teacher in the Music Department at Eastern Oregon State College (EOSC) in that (1) she was terminated from a tenured position and then hired back on a part-time basis, while non-tenured men were not terminated; and (2) while serving as a part-time, non-tenured faculty member, she was not allowed to serve on faculty committees or advise students, while men in the same position were allowed to serve on faculty committees and to advise students; and (3) after she was terminated from a tenured position, she was required to work .65 FTE while being paid as if she worked .35 FTE. Ms.

Rathe intervened in this action as a named plaintiff without filing a charge of discrimination with the Equal Opportunity Commission.

Ms. Rathe received a B.F.A. degree and a Masters degree in music from Kearney State College, Nebraska, in 1956 and 1957, respectively. In lieu of a thesis or of a musical performance, she satisfied the degree requirements by taking extra courses in education. She then taught music in the Nebraska Public Schools for several years before coming to EOSC as a part-time instructor in 1961. In 1962 Ms. Rathe became a full-time faculty member. In 1964 she was promoted to assistant professor and granted tenure. In 1972 she was promoted to associate professor.

Ms. Rathe's work at EOSC was divided primarily into two parts: (1)she taught

music education courses to elementary education majors and to music majors, and (2)she taught in the campus laboratory school -- an elementary school in which EOSC students who were preparing to become elementary teachers could do practice teaching. From time to time, however, she taught a performance course for the recorder (a flute-type instrument) and some non-education music courses.

Ms. Rathe was an able teacher and a hard worker. No contention has been made that merit played any part in her termination. In fact, she received special recognition for her work at the campus laboratory school. She was, however, not a music performer, and she did not do research.

MS. RATHE'S CLAIM OF SEX DISCRIMINATION IN HER TERMINATION FROM TENURED POSITION

In the mid- to late-1970's a financial "crunch" left EOSC with a $58,000 deficit in its budget. President David Gilbert testified as to the reasons for the budgetary problems:

> A . . . One major [factor] had to do with the under funding of both academic and classified salaries by the State Legislature. That is to say, we were told to give a certain percentage raise, and then as I recall, the amount of money we were given to do that raise was, in the case of academic employees, one percent less; in the case of classified, I think it was two percent, something like that.
>
> That was one major factor that -- the theory that the Legislature operated under is that there would be sufficient turnover and so on and so forth to absorb that.
>
> In the case of a small institution like ours, when we're dealing with small numbers, those kind of statistical averages and so forth don't necessarily happen.
>
> That situation was alleviated a little bit. In addition, we

had been given a new mission [by the Legislative Assembly] some resources internally. That was another aspect of it. In any event, we came up approximately $58,000 short in our needs and our resources.

(Tr. 13,077-78).

On May 17, 1978, then-President Rodney Briggs informed the faculty of the budgetary crisis and advised the faculty that EOSC would have to reduce or eliminate some of its programs. The faculty, through various committees, became involved in determining which programs (as opposed to which people) could be reduced or eliminated. President Gilbert testified as to the extent of faculty involvement as follows:

Q (by Mr. Casby) Dr. Gilbert, you talked about a process, and I'd ask you how that process went and what its objectives were to the extent you are able to describe that.

A The process was, as I said before, started with

> consultation with the advisory committee to the president, which is an elected committee, then moved to the educational policy and curriculum committee to identify finally or to get concurrence from the committee on the identification of programs, not individuals, which might be reduced; moved on to the personnel committee to discuss personnel consequences; finally culminated in a series of meeting with -- meetings with administrators, including the division heads, the academic dean or the dean of academic affairs, and others, which finally crystallized in the president's mind those programs to be reduced; and then finally the -- one of the last sessions had to do with the identification of individuals within programs to be reduced.

(Tr. 13,086).

Ms.Rathe does not challenge the procedures followed by EOSC during the program reduction process, nor could she. The record reflects that EOSC administrators painstakingly followed the Oregon Administrative Rules in

determining what programs were to be reduced or eliminated.

In June, 1978, Ms. Rathe and three others, an untenured man in the History Department, a tenured man in the Psychology Department, and a tenured man denominated "media specialist" (apparently without a department designation), received notices of termination to be effective in June, 1979. They were all advised of the budgetary problems of the institution and of the decision by EOSC to reduce or eliminate from the curriculum all or a part of the programs in which they were involved. All terminations were "without prejudice," a term meaning without regard to merit.

These faculty members were given the required one year notice of termination. In addition, then-President Briggs

assigned the academic dean to work with them regarding employment for the 1979-80 academic year -- retraining or relocating them or retaining them on a part-time basis.

Ms. Rathe was understandably shocked and angry. She asked the academic dean why she, rather than one of the two untenured men in the Music Department, had been selected for termination. The dean's answer was that the music education program where she taught had been selected for reduction, and it naturally followed that she was the one who had to be terminated. Ms. Rathe was not satisfied with this explanation. Ultimately the academic dean asked her to prepare a document advising him what she could do within the Music Department and suggesting how the music program could be rearranged in order that an

untenured man could be terminated instead of her.

Ms. Rathe prepared a proposal which was rejected by Dr. John Cobb, Chairman of the Music Department, for this reason: A degree program in the Music Department requires musical performance -- that is, any student who wishes to receive a degree in music must learn to perform -- to sing, to play a musical instrument, or to compose (the record is unclear whether composing qualifies as performing); the two untenured men in the Music Department are performers; they can teach students to perform (the flute, the violin, the piano, whatever their expertise); Ms. Rathe is not a performer; elementary music education, Ms. Rathe's area of expertise, is not a requirement for a degree in music; therefore, elementary music education can

be reduced without jeopardizing the music degree program.

The Dean agreed with Dr. Cobb's rejection of Ms. Rathe's plan and turned to other possibilities for employment for her. These offers were made to her at various times during the summer of 1978: (a) that she be immediately relieved of her teaching duties during the 1978-79 school year (with full pay) in order to allow her to find a job elsewhere or to be retrained; (b) that she accept a job as a full-time teacher with tenure at the laboratory school for the 1979-80 school year and thereafter; (c) that she accept a half-time position with tenure at EOSC for the 1979-80 school year and thereafter. Ms. Rathe declined all of these offers, apparently because she planned to continue her efforts to retain her former tenured position. She

filed at least five internal grievances, a grievance with the Department of Health, Education and Welfare, and a grievance with the American Association of University Professors (AAUP).

The AAUP conducted extensive hearings regarding Ms. Rathe's termination and ultimately censured EOSC. The AAUP opposed EOSC's action in meeting a budget crisis by terminating tenured faculty. The issue before this court, however, is not whether EOSC acted wisely in meeting a budget crisis by terminating tenured faculty, but only whether sex discrimination played any part in Ms. Rathe's termination.

Ultimately, Ms. Rathe remained at EOSC in a part-time position for the 1979-80 and 1980-81 school years, teaching the "bits and pieces" that were left of her program after it was

reduced. Although she implies in her testimony that she was told that all of her courses and laboratory school work were going to be eliminated after she was terminated, the evidence does not bear this out. The courses that she had taught and the laboratory school work that she had performed were reduced to the bare necessities for the teacher certification program in elementary education, but there were still necessary "bits and pieces" of her courses remaining. Originally, it had been intended that these "bits and pieces" would be absorbed by other faculty members or taught by adjunct professors whom EOSC could hire for less than Ms. Rathe.

At the time she was given the notice of termination there were four male faculty members in the Music Department:

(a)John Cobb, a tenured professor with a doctoral degree in musical arts who came to EOSC in 1960; (b)C. Robert Groth, a tenured professor with a doctoral degree in musical arts who came to EOSC in 1963; (c)James Robertson, an untenured faculty member who had an M.A. degree and who came to EOSC in 1974; and (d) Robert Klak, an untenured faculty member who had an M.A. degree and who came to EOSC in 1976. Ms. Rathe contends that, because of her sex, she was terminated rather than one of these men. However, Dr. Cobb and Dr. Groth had doctoral degrees and came to EOSC either before or shortly after Ms. Rathe. Under any criterion used for determining who would be terminated, it would be reasonable to terminate Ms. Rathe rather than either of them.

Ms. Rathe has, though, presented sufficient evidence to require the Board to come forward with a reasonable, non-pretextual basis for its termination of Ms. Rathe rather than one of the two more-recently-hired, untenured men in the Music Department.

President Gilbert testified that at the time of the termination of Ms. Rathe and the three men the primary goal was to retain degree programs -- i.e., those programs that are requirements for obtaining degrees, and that programs were identified for reduction rather than individuals identified for termination. He testified as follows:

> Q (by Mr. Casby) Now, how were the programs then identified? I realize you are saying it was programs before people, but how did the programs themselves get ----
> A There was an --
>
> Q -- picked out?

A -- analysis made of each and every position on campus ----

Q With what --

A -- with the --

Q -- considerations?

A -- idea that -- one of the major considerations was that we not lose a degree program.

Q And why was that a major consideration?

A Because of the importance that -- to -- of degree programs to meeting our objectives of educating students.

Q And what impact would loss of a degree program have on student enrollment?

A It would -- it could have a significant impact, not only in terms of enrollment but in terms of the balance of the curriculum.

Q And where does Eastern stand with respect to student enrollment in terms of --

A It's always been a very important issue for us and a problem because of our relative rural isolation.

. . .

Q And, Dr. Gilbert, in the process of identifying programs, was there

consideration of tenured versus untenured, or did that come about only -- only later?

A In -- in -- in the analysis, the initial analysis, every single position on campus was looked at. When we finally got to the point within a program of identifying individuals for reduction, then tenure became a factor. However, there was an overriding factor, which is the one that I just mentioned; that is, that we had to retain the breadth of expertise necessary to continue to offer the program. And so at least in one case, we had some -- a reasonable degree of redundancy within the faculty and the program, and we had some tenured and untenured people. And, unfortunately, from the stand point of protecting tenure, the untenured positions were necessary to continue to offer the degree program because of their expertise in their particular subdiscipline. (Tr. 13,086-88).

. . .

Q Well, then, why was it that she was -- or the program in which she served in and ultimately she, was identified for program reduction in 1978? Why did that happen?

A Well, it was a process of going through every position we had on campus, looking at programmatic needs and institutional priorities. And it was determined finally by the

president that this is a program area that we could reduce, and she was the sole occupant of -- of a position within that program, being the elementary music area.

(Tr. 13,090).

This stated policy of keeping degree programs was carried out consistently in determining which programs to reduce or eliminate and which persons to terminate. Referring to Def. Ex.6266 which is a listing of the program areas that were finally identified for program reduction, President Gilbert testified as follows:

Q [By Mr. Casby] Which one was the untenured male?

A History I.

The Court: History I. And the media specialist and the psychology, they were tenured males?

The Witness: That's correct.

The Court: And the history program was left in tact and the psychology program was left intact?

The Witness: That's correct.

The Court: But the elementary music program was eliminated?

The Witness: No, it was not.

The Court: It was not?

The Witness: It was reduced.

Q [By Mr. Casby] Now, would you explain what you mean by that because I don't comprehend that. Was there an elementary -- is there an elementary music program now?

A Yes, there is.

Q And has there been since 1978?

A Yes, there has.

Q Well, what do you mean it was reduced?

A The amount of time spent with the children in the Ackerman Laboratory School was reduced significantly. The number and range of courses that we taught were reduced to the absolute essential courses for certification.

Q What happened in psychology? Was that reduced as well?

A Well, in the sense that we had fewer faculty members to offer the broad range of courses and so there were fewer sections offered and fewer -- well, fewer sections

offered but the degree -- the degree remained. Just less flexibility.

Q And how about in history.

A The person in history was really part in history and part working with cooperative education and field placement and that again was reduction in the flexibility within the history program.

Q Just for purposes of understanding, you're now discussing history?
A That's correct.

Q Before you were discussing psychology?

A Yes, that's correct. The history program was still offered.

(Tr. 13,094-95).

The court concludes that sex discrimination played no role whatsoever in the termination of Ms. Rathe and that the reasons given by EOSC for her termination were not a pretext for discrimination.

Ms. Rathe cannot prevail on this part of her individual claim.

OTHER CLAIMS

I.

Ms. Rathe contends that she was not allowed to serve on faculty committees or to advise students during the 1979-80 and 1980-81 academic years when she served as a part-time non-tenured faculty member.

Ms. Rathe was never forbidden to serve on faculty committees or to advise students. These were responsibilities that she was no longer required to do as part of her job because there was no money to pay her for these activities. EOSC was justified in not requiring Ms. Rathe to serve on committees or advise students. There is no evidence that her responsibilities were reduced because of sex discrimination. These were budgetary decisions.

Ms. Rathe cannot prevail on her second claim.

II.

For the 1979-80 and 1980-81 academic years, Ms. Rathe was offered .35 FTE positions. She claims she was then assigned jobs which were equivalent to .65 FTE or .85 FTE positions.

Ms. Rathe was instructed to teach one three-hour course per week and to work in the laboratory school eight hours per week. Dr. Gilbert testified that the workload for which she was paid was arrived at according to the following formula:

> Q (By Mr. Casby) While you are being handed them, I'd like to ask you what the nature of your analysis was with respect to the workload that Ms.Rathe was being asked to do.
> . . .
>
> A Yes, I used the average -- the average of the faculty reports of service, which indicates that

faculty members at our institution spend, on the average, 57.9 percent of their time on instruction. We made an assumption of a 40-hour work week. 60 - 57.9 percent of 40 hours is 23.16. And we added -- so we translated the Music 383 course into -- into hours and put the 8.21 hours of Ackerman assignment along with it, and finally came up with essentially with the .35. So it's the only way I knew how to do it. It's easier if someone is teaching straight courses to do, but in this case, the Ackerman assignment's not a formal kind of assignment.

Q Now, normally -- that is to say, before the program reduction became effective, Ms.Rathe worked more than eight hours in Ackerman, did she not?

A Yes, she did.

Q And after the program reduction became effective, what was her position about how much she was being asked to work in Ackerman?

(Clerk Handing.)

A Well, she -- we told her to -- to adjust, to -- to devise a system whereby she didn't spend any more than about 8 hours. As I recall, she said she wanted to spend more time or would spend more time than that, and we tried to make it clear to her that we were only requiring that she spend a total of eight

hours with that assignment, including preparation.

Q And was there any discussion with her about her advising --

A Yes.

Q -- responsibilities?

A We tried to make it clear that we were not requiring that she advise students.

Q Okay. And why was this? Why were these restrictions, if you would, or conditions or whatever you'd call them, being placed upon her position?

A Because we didn't have the money to pay for the time to do that.

(Tr. 13,120-121)

From Dr. Gilbert's testimony the court finds that faculty members at EOSC spend an average of 57.9 percent of their time on instruction. For Ms. Rathe's three-hour teaching assignment, EOSC assumed that she would put in

$$\frac{100}{57.9} \times 3 = 5.18 \text{ hours}$$

of work for the three-hour course that she taught. She was then required to work an additional 8.12 hours per week in the campus laboratory school. Thus her total hours for each week were 13.3 hours. Basing the percentage of time (FTE) computation on a 40-hour work week, her percentage of time (FTE) should be 13.3 divided by 40. This comes out to .332, which is very close to the .35 FTE she was assigned and for which she was paid.

That Ms. Rathe may have worked longer and harder than was required by EOSC is of her own doing. There is no showing that she was required to work the hours that she chose to work or that sex discrimination played any role in this aspect of her employment.

Ms. Rathe cannot prevail on her third claim.

WESTERN OREGON STATE COLLEGE

MONMOUTH, OREGON

Dr. G. Joanne Amspoker

Dr. Anna Penk

Dr. Mary Ann Petry

DR. G. JOANNE AMSPOKER

Dr. G. Joanne Amspoker, a professor of history at Western Oregon State College (WOSC),[1] claims that she was discriminated against because of her sex in that during her entire time of employment at WOSC she has received less salary than equally-qualified males who have performed substantially the same job as she has performed. Dr. Amspoker filed a timely complaint with the Oregon Bureau of Labor, Civil Rights Division, and received a Right to Sue Letter on August 8, 1980.

Dr. Amspoker received a B.A. degree from Reed College in 1942 with a major in literature and languages, and an M.A. degree from Radcliffe College in 1946 with a major in history and a minor in government. She received a Ph.D. degree from the University of Minnesota in 1959

with a major in history and a minor in political science.

Prior to her employment at WOSC she was a teaching assistant at Reed College (one year), a history teacher at The Dalles High School (two years), a graduate teaching assistant at the University of Minnesota (two years), and an instructor, assistant professor, and associate professor at Cedar Crest College in Allentown, Pennsylvania (nine years).

Dr. Amspoker was hired at WOSC in September, 1961, as a part-time instructor in the History Department, a division of social sciences. In September, 1962, she became a full-time assistant professor, and in 1964 she was granted tenure. In 1965, Dr. Amspoker became an associate professor, and in 1975, a full professor.

Dr. Amspoker has served on these committees at WOSC: the Honors Committee; the Faculty Standards Committee; the Financial Aid Committee; the Dean's Committee to Evaluate and Reform the College Advising System; the Faculty Senate and its Faculty Evaluation Committee; and the Department of History Personnel Committee. Dr. Amspoker has been a member of the American Historical Association and the American Association of University Professors. Her evaluations by students, fellow faculty members, and WOSC administrators have been good. Her scholarly research and publication record is very limited.

Dr. Amspoker complains that three of her male colleagues in the History Department have consistently received higher salaries than she has received

from the time of their hire to the present. She contends that she is equally qualified and performs substantially the same work as they perform. Dr. Amspoker testified as follows [by affidavit]:

> "My three comparators are Hermas J. Bergman, Ross Cotroneo, and Gary Huxford. I chose Dr. Bergman as a comparator because my teaching and Dr. Bergman's teaching has substantially similar respect among our colleagues and students. I am above Dr. Bergman in that I have five years more service at the college than Dr. Bergman has. Since about 1979 Dr. Bergman has been dean of liberal arts and science for the college.
>
> I chose Dr. Cotroneo as a comparator because we are comparably qualified in the fields of history in which we teach. We are substantially similar in the respect with which our colleagues and students hold us for our teaching abilities. I am above Dr. Cotroneo in that I have five years more service than he has. We are substantially similar in the contributions we

> have made to the college community, except that Dr. Cotroneo since 1979, has been department chairman for several years. Dr. Cotroneo's publication record is better than mine.
>
> I chose Dr. Huxford as a comparator because Dr. Huxford and I have substantially similar respect among our colleagues and students for our teaching. Dr. Huxford was hired at OCE in 1961. He was teaching elsewhere from 1966 to 1969 and, I believe, in 1970, so his years of service on campus are fewer than mine. His publication record may be slightly above mine. Our service records have been substantially similar.

Pl. Ex. 2693, Pgs. 5, 6.

Dr. Amspoker claims that there is no legitimate reason for her comparators to receive higher salaries than she receives and that the salary difference is attributable to her sex.

A sample of the salary figures for Dr. Amspoker and her comparators from year of hire to 1980 are as follow:

Year	Amspoker	Bergman	Cotroneo	Huxford	
1961	6,250			5,800	
1966	8,800	8,850	9,500	8,850	(moved to Utah State until 1969)
1969	10,856	11,848	11,998	12,948	(returned to WOSC)
1972	12,892	13,748	13,700	14,870	
1976	19,499	20,616	19,970	20,547	
1980	23,573	25,106	25,592	25,022	

Table I

The following chart shows (1)the date of birth; (2)the year service at WOSC began; (3)the date the Ph.D. degree was received; and (4)the year of promotion to full professor of Dr. Amspoker and her comparators:

	Amspoker	Bergman	Cotroneo	Huxford
Date of Birth	1922	1926	1930	Younger than others, but date not in evidence
Year Service at WOSC began	1961	1966	1966	1961 (Gone 1966-1969)
Year Ph.D. obtained	1959	1967	1966	1963
Year Promoted to full professor	1975-76	1973-74	1974-75	1973-74

TABLE 2

Dr. Amspoker received her Ph.D. degree eight years before Dr.Bergman and seven years before Dr. Cotroneo. She has been at WOSC five years longer that both Dr. Bergman and Dr. Cotroneo. She received her Ph.D. degree four years before Dr. Huxford, and although both Dr. Amspoker and Dr. Huxford joined the faculty at WOSC in 1961, Dr. Huxford left WOSC to teach elsewhere for three years before rejoining WOSC in 1966.

The salary comparison and the comparison made of other factors known to influence salary require the Board to come for ward with legitimate, non-discriminatory reasons for the salary differences between Dr. Amspoker and Drs.Bergman, Cotroneo, and Huxford.

The Board contends that the Social Sciences Department and in particular the history section, unlike WOSC in

general, has emphasized publication and scholarly work since 1966. History section faculty must do research and write scholarly papers for publication in order to receive the types of satisfactory evaluations that lead to promotions and higher salaries, says the Board, and the differences between the salaries of Dr. Amspoker and Drs.Bergman, Cotroneo, and Huxford can be explained on the basis of publications. For example, the Board argues, Dr. Bergman has published four articles in major scholarly journals [two as book reviews], and he has presented two papers to professional organizations since 1968. Dr. Huxford has published four articles in scholarly journals, and he has presented three major papers. Dr. Cotroneo has published ten articles, plus the publication of his Ph.D.

dissertation in book form. He has also presented scholarly papers at several conferences and has been the recipient of one grant.

In order to bolster its contention that lack of publications explains Dr. Amspoker's lower salary, the Board offers the example of Dr. Samuel Anderson, who has also been held in rank because of a poor publication record. Dr. Anderson joined the faculty at WOSC in 1959 and is regarded highly as a teacher. He published one article in a scholarly journal in 1972 and several entries in the Encyclopedia Americana Annual. The publication of the 1972 article led to his promotion to full professor after eight years in the rank of associate professor. Dr. Amspoker was promoted to full professor in 1975 after ten years in the rank of associate professor. Dr.

Cotroneo testified and Dr. Amspoker agreed that lack of publications delayed her promotion, as well as Dr. Anderson's.

The Board contends that Dr. Amspoker's salary has kept pace with Dr. Anderson's salary and that any difference reflects only that (1) Dr. Anderson joined the faculty two years before Dr. Amspoker and (2) Dr. Anderson was promoted to full professor three years before Dr. Amspoker. Dr. Amspoker agrees that Dr. Anderson is an appropriate comparator, but argues that Dr. Anderson's salary, which has been consistently higher than her salary and substantially equal to the salaries of Drs. Bergman, Cotroneo, and Huxford, negates the Board's explanation that her salary has remained lower than her male

colleagues because of her poor publication record.[2]

From 1961, when Dr. Amspoker was hired, until 1983, Dr. Anderson has averaged $951 more per year than Dr. Amspoker.[3] He has received a salary substantially equal to or more than Drs. Bergman, Cotroneo, and Huxford over this same period. Dr. Amspoker contends that if publication record is the legitimate, non-discriminatory explanation for her salary being lower than the salaries of Drs. Bergman, Cotroneo, and Huxford, then Dr. Anderson's salary should have remained lower than the salaries of Drs. Bergman, Cotroneo, and Huxford.

It is true that in contrast to Drs. Bergman, Cotroneo, and Huxford, Dr. Amspoker has not published anything in <u>scholarly</u> publications. Before she came to WOSC in 1961, she published two

articles in the Cedar Crest College Bulletin, a bulletin for students and alumni of Cedar Crest College, and she prepared three one-page entries in the Encyclopedia Americana Annual, one page in each of the years 1975, 1976, and 1977.

Dr. Amspoker contends, however, that her lack of publications does not explain the salary differences. She claims the differences are explained by the attitude of Dr. Paul Griffin, chair of the Social Sciences Department from her arrival in 1961 until 1979. Dr. Amspoker testified (by affidavit) as follows:

> "I was told by Dr. Rice, President of the College in about 1975 or 1976 that Dr. Griffin was anti-feminist and that he would not recommend that a woman get a salary equal with a man.

Dr. Amspoker's testimony about Dr. Griffin's purported statement is hearsay. The credibility of the statement is further limited by the fact that it is not corroborated in any way and that from 1961 to 1980 Dr. Amspoker received percentage of salary increases substantially equal to her male colleagues. Dr. Griffin had to recommend and/or approve those percentage of salary increases. (See Def. Ex. 4286 following this page). Yet the credibility of the alleged statement is bolstered by the fact that the Board offered no evidence that Dr. Griffin did not hold this opinion and that despite the fact that her percentage of salary increases kept pace, her salary remained below her male colleagues and admittedly unexplainably low.

On January 29, 1974, the history staff wrote:

> "[W]e would urge that Dr. Amspoker be given another major increase in salary next year--at least $1,000 beyond the basic increase for all staff. This would bring her into the general area of the average salaries for associate professors in this department, certainly a minimal level for someone of her abilities and years of service.

Def. Ex. 4002E.

Table 3 p.1

SALARY COMPARISONS

WESTERN OREGON STATE COLLEGE HISTORY FACULTY

Instructor	1961	1983	Increase	%	Average Annual Increase
Amspoker	$6250	$28,348	$22,098	354%	$1,004
Anderson	$7000	$29,452	$22,452	321%	$1,021
Dortmund	$6000	$26,754	$20,754	346%	$ 943
Huxford	$5800	$30,091	$24,291	419%	$1,104

1961-63 dollar increase ★ = $89,595 ÷ 4 = $22,399

Note: The original staff with Huxford leaving in 1966 and returning in 1969.

Instructor	1966	1980	Increase	%	Average Annual Increase
Amspoker	$8800	$23,573	$14,773	168%	$1,055
Anderson	$9600	$24,490	$14,890	155%	$1,064
Bergman	$8850	$25,106	$16,256	184%	$1,161
Cotroneo	$9500	$24,692	$15,192	160%	$1,085

1966-80 dollar increase = $61,111 ÷ 4 = $15,278

Note: Bergman and Cotroneo were hired in 1966. Bergman assumed the position of Dean in 1981.

Instructor	1966	1983	Increase	%	Average Annual Increase
Amspoker	$8800	$28,348	$19,548	222%	$1,150
Anderson	$9600	$29,452	$19,852	207%	$1,168
Cotroneo	$9500	$29,879	$20,379	215%	$1,199
Dortmund	$8200	$26,754	$18,544	226%	$1,091

1966-83 dollar increase = $78,323 ÷ 4 = $19,581

Note: Bergman and Cotroneo hired in 1966. Bergman exluded because of advancement to position of Dean.

★ COURT NOTE: This must mean 1961-83.

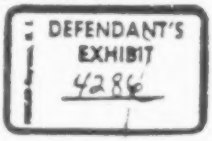

Table 3 p.2

Instructor	1966	1978	Increase	%	Average Annual Increase
Amspoker	$8800	$21,383	$12,583	143%	$1,049
Anderson	$9600	$22,216	$12,616	131%	$1,051
Bergman	$8850	$22,513	$13,663	154%	$1,139
Cotroneo	$9500	$22,105	$12,605	133%	$1,050
Dortmund	$8200	$18,824	$10,624	130%	$ 885
Huxford	$8850	$22,428	$13,578	153%	$1,132

1966-78 dollar increase = $75,669 ÷ 6 = $12,611

Note: Paul Griffin was Chair of Social Science until 1978. Cotroneo assumed the position in 1979.

Source: 1983 Faculty Data Sheet

In the 1973-74 academic year, the coordinator of the history section wrote on Dr. Amspoker's annual report for personnel file the following statement:

> "Dr. Amspoker has continued to fill with competence a key role on the history staff. Her work with the Honors Program in particular is deserving of commendation. Unfortunately, for some years, the quality of her service has not been rewarded by an equitable salary. Major efforts have been made recently by the college to correct this imbalance, but more should yet be done to bring her into line with other associate professors in the social science department.

On January 31, 1977, an evaluation by the coordinator of the history section, Dr. Cotroneo, contained this statement written to Dr. Griffin, the department chair.

> "Dr. Amspoker continues to provide the history staff with a quality performance. She is an excellent teacher,

and is highly respected by both her students and her colleagues. Her classes have remained popular with students even though her reputation as a rigorous professional is well known. Her work with the Honors program remains a good example of her on-going contribution to the history staff and to the social science department. Joanne also serves on several important campus committees, including the Faculty Senate. Serious efforts have been made in recent years to bring Joanne's salary up to that of others of the history staff of similar service, productivity, and years in rank. Joanne understands and appreciates what has been done and asks that these efforts be continued as much as possible."

On February 23, 1978, the history section coordinator, Dr. Cotroneo, wrote these statements:

"Dr. Amspoker was promoted to the rank of professor in 1975. Serious efforts have been made since that time to bring her salary up to that of <u>others on the history staff of similar service, productivity, and years in rank</u>. While funds are limited at this time, the effort to establish and

maintain a fair salary should be continued. (Emphasis added.)

Dr. Cotroneo was asked about these recommendations and statements during his testimony. He testified as follows:

> Q [By Ms. Abernethy] What if anything do you recall about the factors which led to that recommendation? [January 29, 1974 recommendation]
>
> A The history staff felt in general that they were all underpaid but that Dr. Amspoker was lower than probably normal and urged them that something be done if possible. Dr. Amspoker had for a number of years prior to this date, this is dated 1-29-74, had urged that something be done about her salary. We were complying with her request to some extent.
>
> Q Did you think she was under -- did you think she was underpaid in 1974, Dr. Cotroneo?
>
> A I have not looked specifically at that date, but I have never been of the opinion personally that she was that far out of line.

(Tr. 14,619-620).

Dr. Cotroneo explained that the recommendations he made as department coordinator on behalf of Dr. Amspoker were basically "jargon" written at the request of Dr. Amspoker. He differentiated the language used in her recommendations from those written for Dr. Huxford. He used what he called "stronger words" for Dr. Huxford -- diligent, conscientious, trusted, valuable, respected.

The issue the court must determine is whether it is true that the Social Science Department, and in particular the history section at WOSC require scholarly research and publication for promotion and pay increases or whether the requirement of publication is simply a pretext the Board has used for sex discrimination.

Dr. Cotroneo, current chair of the Department of Social Science, testified as follows:

> Q [By Ms. Abernethy] And if you know, was there any difference in your view, either from your experience as coordinator or chairperson, in the manner in which faculty persons in the Social Science Department were evaluated which differed from the manner in which they were evaluated in other departments? I guess I mean was there different emphasis given in Social Science to one kind of criteria versus another which maybe wasn't true in other departments?
>
> . . .
>
> A Yes, I think we had a more elaborate system and more difficult one for that matter for promotion and tenure.
>
> Q (By Ms. Abernethy) What do you mean by more difficult?
>
> A Well, we -- we -- especially the history staff, again, I emphasize that, we pushed for publication. It was our belief in history and it became the belief of the department itself that anyone in the social

sciences should be able to publish something beyond the Ph.D. And we felt that that was a basic guideline that we would live by. We had agreed to that much earlier and we spelled it out in detail and to my knowledge other departments use a different set of criteria.

Quite obviously in some cases publication may not be all that valuable. But we felt for ourselves, we did not try to impose this upon anyone else, but for ourselves this was something we had to do.

Q Well, why in your experience as a history professor and coordinator, does the history staff feel that publication was an important requirement in your discipline?

A Well, it's generally agreed that a historian, especially historian doing research, writing, must write something that his colleagues, his peers, would appreciate or respect as some kind of contribution in the field.

It's -- it's true, I think in most of the social sciences, and we, as I say, stress that. But especially for historians. It seems to me and it seems to the staff that this has to be done. We must prove ourselves

and write dissertation and rest on that, but we felt there needed to be some proof of ability through research, writing ability, that sort of thing.

Q In your experience at Western, do you believe that the history staff placed more importance on publication in refereed journals than was placed on refereed journals in other departments?

A Yes. Very much so. In fact, to the extent or insistence that some of our people stayed in rank longer than normal.

(Tr. 14,615-617).

Dr. Cotroneo's testimony, which the court finds to be credible, is corroborated by Dr. Amspoker, who admitted in her testimony that the delay in her promotion to full professor was attributable to her lack of publications, and Dr. Amspoker makes no legal complaint about the timing of her promotion. She admits that Dr.

Anderson's promotion was also delayed because of his publication record.

The court concludes that scholarly research and publication are important factors in promotion and salary decisions in the WOSC Social Sciences Department, and particularly in the history section of that department, and that Dr. Amspoker has no scholarly publications to her credit since coming to WOSC in 1961. This does not however, explain the Board's own evidence that Dr. Anderson, who had a publication record substantially equal to Dr. Amspoker's, did not experience the same salary depression as Dr. Amspoker. Furthermore, Dr. Anderson's experience is contrary to the Board's position throughout this case that a low starting salary limits the equity that can be maintained in salary. In Dr. Anderson's case, he

started in 1959 at $5,750 (Dr. Amspoker started in 1961 at $6,250) and remained substantially equal to male colleagues who were hired seven years later at almost twice his initial salary.

The court now turns to two other factors about Dr. Amspoker which may relate to her salary: (1) Dr. Amspoker's health and (2) Dr. Amspoker's ability to be "collegial" in an academic setting. As to Dr. Amspoker's health, Dr. Cotroneo testified as follows:

> "THE COURT: Okay. The other question I wanted to ask you was what is your understanding of the health condition of ----
>
> THE WITNESS: Dr. Amspoker?
>
> THE COURT: Yes, Dr. Amspoker. And how long has this existed?
>
> THE WITNESS: It's been a continuous thing, diabetes that has complications, and it ebbs and flows. She was in very

good health, I thought, when I first started in 1966. And then we've seen a gradual decline.

She was -- she has had major problems. Last fall, for example, she was out the entire fall because of -- of, I can't remember the diagnosis, but it has something to do with the heart. So the staff covered for her, which allowed her to receive her salary. She lost her sick leave days, but -- but much to our surprise, she seems much improved since that time, since winter -- winter quarter and spring quarter, and she's performing her duties as well as ever.

(Tr. 14,661).

As to Dr. Amspoker's ability to be collegial, Dr. Cotroneo testified as follows:

Q [By Ms. Abernethy] Is Dr. Amspoker included in that close-knit group, Dr. Cotroneo?

A As much as possible. Dr. Amspoker is difficult to work with sometimes. I think a part of that's due to her health problems. She has to have something to eat at specific times of the day and she is

notoriously brusque. We step around that. But, yes, we have tried very hard, I think, to -- to include her in the collegial relationship that we have as a history staff.

We are -- again, I repeat, we are a close-knit group and I have always felt that we have taken care of each other and that she was part of that group.

Q Did she want to be coordinator?

A I don't know. She's never expressed that to me. We don't run around the department saying I want to be coordinator so please vote for me. It's kind of a -- it was a thankless task.

I don't know if I said this yesterday: There was -- there was no stipend. There still is no stipend for the history head. There was no release time. It was a matter of assuming a responsibility that had to be done. The scheduling of classes, the organization of registration day, those kinds of things.

* * *

Q [By Mr. Willner on recross] Do the male members of the

history area go over and have coffee together every morning about ten o'clock in the college cafeteria?

A That -- no, that's not true. Dr. Bergman and myself are, I suppose, the leaders of the coffee clique, but we are always accompanied by at least one geographer. It's a social science coffee sort of thing. But we have allowed others to sit in.

Q Dr. Amspoker ever joined you?

A No, she does not.

(Tr. 14,676-677).

While lack of good health and lack of collegiality in a collegial setting could be factors in salary decisions, the Board's witnesses said they were not in Dr. Amspoker's case.

CONCLUSIONS OF THE COURT

Dr. Cotroneo is not an appropriate salary comparator for Dr. Amspoker. He is a scholar with at least ten publications. He has been an

administrative leader in his department for nearly ten years. Dr. Amspoker has no scholarly publications and she has done little or no administrative work within the Social Science Department.

Dr. Huxford is also not an appropriate salary comparator for Dr. Amspoker. Dr. Huxford's salary is higher than Dr. Amspoker's because of legitimate market considerations. In 1963, Dr. Huxford left WOSC to go to Utah State. In 1966, WOSC's enrollment was going up and the history section "induced him to come back" with a tempting salary that put him "ahead of everyone else." (Tr.14,638). He has managed to stay ahead of Dr. Amspoker because of his publication record of four scholarly articles and three scholarly papers and his greater departmental service.

As to Dr. Bergman, he certainly is not an appropriate salary comparator for Dr. Amspoker after 1981 when he became dean of the College of Liberal Arts and Sciences. His publication record is good, while Dr. Amspoker has no publication record of any substance. However, she earned a Ph.D. degree eight years before Dr. Bergman; she came to WOSC five years before he did; and the history coordinator repeatedly wrote that her salary should be brought up to the level of others with "similar service, productivity and years in rank."

The court need not determine whether Dr. Bergman is an appropriate salary comparator for Dr. Amspoker because the court finds that Dr. Anderson is an appropriate salary comparator for Dr. Amspoker. Dr. Anderson was hired at WOSC in 1959 and received his Ph.D. in 1960.

Dr. Amspoker was hired at WOSC in 1961 and received her Ph.D. in 1959. Possessing a terminal degree at the time of hire is a critical element in later salary determination. Regardless of whether the difference in Dr. Anderson and Dr. Amspoker's salary in 1961 was justified by legitimate factors (and cognizant of the fact that sex was a legitimate factor in 1961), the court finds that the two additional years of service by Dr. Anderson prior to receiving his Ph.D. degree and the three additional years that he was a full professor do not account for the 23 years that Dr. Anderson received a substantially higher salary than Dr. Amspoker. Several of the years where the salary differences between Dr. Anderson and Dr. Amspoker were highest occur prior to his promotion to full professor

and during the time when Dr. Amspoker and Dr. Anderson were both at the associate professor rank, i.e. 1968, 1969, and 1970. See infra footnote 3.

Dr. Amspoker and Dr. Anderson have performed substantially equal work throughout their careers at WOSC. The Board has failed to raise legitimate, non-discriminatory reasons to account for Dr. Anderson's substantially higher salary. It is reasonable to infer that the salary differential is attributable to sex discrimination.

Dr. Amspoker is entitled to prevail on her individual claim.

Dr. Amspoker Footnotes

1. Western Oregon State College was called Oregon College of Education until the early 1980's. The court will use the acronym WOSC for this institution throughout this opinion (including the section regarding Dr. Anna Penk), regardless of time frame.

2. Although Dr.Amspoker proposed no findings of fact as to Dr.Anderson, the court makes this comparison in response to the Board's argument that this evidence rebuts Dr.Amspoker's prima facie case.

3. Defendant's Exhibit 4287 lists the following salary levels for Dr. Anderson and Dr. Amspoker:

Year	Anderson	Amspoker	Difference
		part-	
1961	7000	6250 time	750
1962	7500	6575	925
1963	7875	7550	325
1964	8400*Assoc.		
		7550	850
1965	9200	8400* Assoc.	800
1966	9600	8800	800
1967	10416	9408	1008
1968	11184	10152	1032
1969	12217	10856	1361
1970	13010	11641	1369
1971	13540	12357	1183
1972	14082*Prof.		
		12892	1190
1973	15165	13860	1305
1974	16006	15077	929
1975	18247	17567* Prof.	680

1976	20345	19499	846
1977	21362	20474	888
1978	22216	21383	833
1979	23104	22238	866
1980	24490	23573	917

(Table continued)

1981	26547	25552	995
1982	27397	26479	918
1983	294522	83481	104

Total difference over period	$21,874
Average difference over period	$951

DR. ANNA PENK

Dr. Anna Penk, an associate professor in the mathematics section of the Natural Science and Mathematics Department of Western Oregon State College (WOSC)[1] claims that she was discriminated against because of her sex in that (1) she was placed on a fixed-term appointment in 1973 and denied a tenure track appointment until 1979; (2) she was paid less than equally qualified men who performed substantially the same job as she performed; (3) she was denied a promotion to full professor in 1983; and (4) she was required to share office space with other women faculty, while the men in her department had their own private office space. Dr. Penk filed a charge of sex discrimination with the Equal Employment Opportunity Commission

and received a Right to Sue Letter on August 8, 1980.

Dr. Penk received a B.A. degree from Whitman College in 1950; an M.A.T. degree from Reed College in 1964; and an M.A. degree and a Ph.D. degree in mathematics from the University of Oregon in 1969 and 1973, respectively. Dr. Penk taught high school at Roosevelt High School in Portland, Oregon, and at South Salem High School in Salem, Oregon, from 1963 to 1966.
Dr. Penk was first hired at WOSC winter term of 1973 as an instructor on a 12 week, fixed-term contract. At that time she did not have her doctoral degree and she had no college teaching experience. Dr. Penk and Claudia Aldrich were hired to teach some of the coursework of Dr. Wong, a tenured faculty member, who had resigned in the middle of the academic

year. Dr. Penk and Ms.Aldrich shared a .74 FTE position based on an annual salary of $9,260.

Spring term of 1973, a tenured faculty member, Janet Tillman, took a leave of absence. Dr. Penk and Ms. Aldrich were asked to teach some of her courses. Their combined FTE that term was .94. Fall term of 1973, Dr. Penk completed her Ph.D. degree and published her dissertation. After Janet Tillman's leave was extended, Dr. Penk was again hired on a 12 week, fixed-term contract, this time at .53 FTE. Since Dr. Penk had obtained her terminal degree, she was promoted to assistant professor, and her salary was increased 7%. She was also hired on 12 week, fixed-term contracts for winter and spring terms of 1974, again because Janet Tillman had extended her leave.

In July, 1974, Janet Tillman resigned. No one was hired to fill the Dr. Wong and Ms. Tillman tenure track positions. Instead, their courses were partially taught by part-time faculty (including Dr. Penk) hired on fixed-term appointments. Dr. Penk taught .73 FTE during the 1974-75 academic year (funds came from the Dennis Williams' position because Dennis Williams was on leave without pay); full time during fall term of 1975; .53 FTE winter term of 1976; .67 FTE spring term of 1976 (funds came from "institutional reserves" -- i.e. money saved when faculty took leaves without pay or sabbatical leaves); full time fall term of 1976; .73 FTE winter term of 1977; and .80 FTE for spring term of 1978 (funds came from the David Jennings' position because David Jennings was on sabbatical leave); full

time during the 1977-78 academic year (funds came from the Dr. Hubert and Dr. Green positions because Drs. Hubert and Green were on sabbatical leaves at least a portion of the time).

While Dr. Penk's 1977-78 academic year appointment was full time, fixed-term, it was denominated "renewable and "tenurable" which meant that if a tenure track position became available, Dr. Penk's service during the 1977-78 academic year would count toward tenure. The 1977-78 academic year was Dr. Penk's first full year of full-time teaching.

Effective the 1978-79 academic year, Dr. Penk was promoted to associate professor and again hired full time, fixed-term "renewable and tenurable." In December, 1978, Dr. Eastman, a tenured faculty member, resigned. In February,

1979, the Personnel Review Committee for the Mathematics Section recommended that Dr. Penk be hired in Dr. Eastman's tenure track position and be granted tenure simultaneously. Dr. Ray Broderson, Chair of the Department of Natural Science and Mathematics, and the Department Personnel Review Committee concurred. On March 28, 1979, Dr. Gerald Leinwald, then-President of WOSC, informed Dr. Penk that he would recommend she be granted indefinite tenure at 1.0 FTE to be reflected in her notice of appointment for the 1979-80 academic year. Dr. Penk accepted this offer. Beginning in the fall of 1979, Dr. Penk became a full-time associate professor of mathematics with tenure.

In 1982, after four years in the rank of associate professor, Dr. Penk applied for a promotion to full

professor. Dr. Penk was denied promotion to full professor at that time on the basis that the department wanted to see the results of her research which was in progress before promoting her.

FIXED-TERM APPOINTMENT

In her first claim of sex discrimination Dr. Penk charges that she was kept on a fixed-term appointment and denied a tenure track position from 1973 to 1979 based upon her sex. The Board's response to this charge is that between 1973 and 1979, no one was hired on a tenure track position in the Department of Natural Science and Mathematics at WOSC because of a general decline in enrollment and the subsequent loss of funds; that the tenure track positions held by Dr. Wong and Ms. Tillman, who resigned during this period, were not filled because the

department could not obtain administrative and budgetary approval to do so; and that Dr. Penk was hired without a search on the first tenure track position which became available and simultaneously granted tenure.

Dr. Penk testified as follows:

> Q [By Ms. Abernethy] So, between when you were initially hired and when you received tenure, there was nobody hired in ahead of you and put on a full-time tenure track position?
>
> A No; five faculty members, however, were given tenure during that period. (Tr. 7,212).

By her own testimony, Dr. Penk was hired on the first tenure track position which became available after she was hired as a part-time faculty member in 1973. Although tenure was granted between 1973 and 1979 to some faculty members in her department who were hired

on tenure track appointments prior to 1973, no new faculty members were hired on tenure track positions between 1973 and 1979. Furthermore, Dr. Penk was not just hired on a tenure track position in 1979 -- she was hired without a search and then simultaneously granted tenure. Ordinarily, a faculty member must have five or more years of full-time, regular employment in a tenure track position before tenure is granted. Ordinarily, a faculty member who is hired into a tenure track position must compete in a national or regional search conducted for the position. In Dr. Penk's case these requirements were waived in recognition of the accumulated 4 years of excellent service Dr. Penk had rendered as a part-time, fixed-term faculty member.

Dr. Broderson testified that he would have moved Dr. Penk from a part time, fixed-term position into a tenure track position had he been able to do so. Dr. Penk also testified to this fact:

> Q [By Mr. Willner] All right. And did you have discussions with Dr. Broderson and others about your wishes in regard to that fixed term appointment?
>
> A Yes, I did.
>
> Q And what did you ask them?
>
> A I was asking that I would be put on tenure track, especially since several people on tenure track had already resigned.
>
> It was Dr. Wong who left before I was hired, then it was Mrs. Tillman, Mr. Eastman -- Eastham, who resigned.
>
> Q All right. When you asked about being placed on tenure track, what were you told?
>
> A Mr. Main, who was the coordinator of the Mathematics Section at the time, was very sympathetic. The Mathematics Department was suffering from that. They could not plan for their curriculum, either, and

he was eager that someone be put on tenure track on a permanent basis in the department.

Since they liked me, they were pushing for me to get tenure track position. I talked to Dr. Broderson, and I asked him if there was anything ----

Q He was department chair of science above Dr. Main?

A That's correct. He told me he was doing all he could to get me a tenure track position.

(Tr. 7,157-158).

That enrollments were declining at WOSC at the time Dr. Penk was first hired is well documented (Def. Ex.8049) and undisputed. Fixed-term appointments are traditionally used more frequently during times of declining enrollment because colleges cannot guarantee funds to continue tenure track appointments. Part-time, fixed-term positions are not equivalent to tenure track positions.

No economic consequences flow from a decision to grant tenure. Economic consequences flow from a decision to denominate a position as tenure track or to place someone in a position already denominated tenure track. Flexibility to adjust the workload and to commit institutional funds is within the discretion of an institution, so long as that discretion is not used to "hide" sex discrimination. There is no evidence in this case that WOSC "froze" tenure track hiring to prevent Dr. Penk from obtaining a tenure track position because of her sex or for any other reason.

Dr. Penk was a valued faculty member whom WOSC considered itself fortunate to have on its faculty. This is reflected in a letter Dr. Broderson wrote to the dean of faculty at WOSC in December, 1976. Dr. Broderson stated to

the dean that Dr. Penk, "may be approached to teach and do research full time" at Oregon State University starting in the fall of 1977. Dr. Broderson said he would like for WOSC to be in a position to compete with Oregon State University for Dr. Penk on a full time basis. The dean of faculty wrote back to Dr. Broderson in January, 1977, stating that he had received Dr. Broderson's "signal" concerning Dr. Penk and that he sincerely hoped that WOSC would be in a competitive position the next year. The dean of faculty told Dr. Broderson to discuss his plans and needs with the president.

There is no reason to believe that Dr. Penk could have been hired <u>at all</u> during the period 1973-79, had there not been unexpected resignations and leaves of absence or sabbatical leaves. That

she was hired is attributable to the college's need and the fact that she was an eager and excellent applicant for the fixed-term, part-time positions available. The court concludes that Dr. Penk was not discriminated against because of her sex during the time she remained in a fixed-term position at WOSC. In order to prevail in an individual case, a plaintiff must prove that: (1) she is qualified for a "better" employment condition (that is, a tenure track appointment); (2) she is not getting the "better" employment condition; and (3) similarly situated "others" are getting the "better" condition. See infra at 4 - Intro - Individual Claims. Dr. Penk has not shown that anyone else was getting the "better" condition.

Dr. Penk cannot prevail on this portion of her claim.

SALARY

Dr. Penk next contends that she did not receive pay equal to that of her male colleagues because of her sex. In support of her claim, Dr. Penk presents evidence that her salary was lower than four men she considers to be "comparable" to her: Dr. Norman Nelson; Dr. Robert Main; Dr. B. Green; and Dr. Edward Wright. The salary figures for Dr. Penk and her comparators from 1977 to 1983 are as follows:

SALARY COMPARISON

Year	Penk	Nelson	Main	Green	Wright
1977	$16,200	$17,815	$18,625	$20,818	---
1978[2]	$18,099	$19,454	$20,502	$22,409	---
1979	$18,099	$19,454	$20,502	$22,409	$19,500
1980	$19,185	$20,921	$21,982	$23,754	$20,920
1981	$20,797	$22,679	$23,828	$26,035	$23,078+ 5,580
1982	$21,463	$23,405	$24,590	$26,868	$24,816+
1983	$23,073	$25,160	$26,434	$28,883	$26,677+

Pl. Ex. 209(c).

Because starting salary often influences salary levels thereafter, the court will first determine whether sex discrimination played any role in Dr. Penk's starting salary. Dr. Penk's starting salary was set by Dr. Ray Broderson in 1973 when she began as a part-time instructor sharing a .53 FTE appointment with Ms. Aldrich. Dr. Penk and Ms. Aldrich had the same annual salary of $9,260. In recommending the starting salary for Dr. Penk, Dr. Broderson wrote to the dean of faculty stating:

> Mrs. Aldrich taught successfully here in 1970-71. Her salary then was based on $9,000. Her application indicates that she taught this past summer for Chemeketa [Chemeketa Community College in Salem, Oregon] at a full time equivalent of $9,260. Her educational background is the same now as in 1970-71, suggesting we hire her at the same relative position.

> Considering the overall improvements in salary schedules and her most recent salary, I recommend Mrs.Aldrich be hired on the basis of $9,260 full time salary.
>
> In the same letter Dr. Broderson wrote, I need your advice about Mrs. Penk [at this time Dr. Penk had had no college teaching experience.] It seems to me, in comparing her qualifications to those of Mrs. Aldrich, that the two backgrounds iron out quite evenly. Mrs. Penk has somewhat less experience teaching, but more academic work -- notably she is pretty well known through her doctoral dissertation. I suggest that the salary of Mrs. Penk also be based upon a full time of $9,260.

Def. Ex. 4283.

Dr. Broderson testified that salaries are always lower for faculty who enter employment without their Ph.D. degrees and that starting salaries are often negotiable. Dr. Penk had not protested her starting salary or tried to negotiate it upward.

Dr. Nelson was hired in 1970 at a beginning salary of $ 11,142. at that time he had his doctorate, was hired as a full-time assistant professor, and had seven years of prior college teaching experience. Dr. Penk, on the other hand, had no doctorate, had no prior college teaching experience, was hired as an instructor, and was, in effect, hired as a .37 FTE employee. Dr. Main was hired full time in 1968 at a beginning salary of $ 10,116. Dr. Main had had ten years of prior public school and college level teaching, while Dr. Penk had had three years of prior public school experience. The court does not consider Dr. Green [3] to be an appropriate comparator for Dr. Penk as to beginning salaries. Dr. Wright will be discussed separately later.

The court concludes that the Board's

explanation as to how dr. Penk's starting salary was determined is reasonable and without sex bias. Nothing in the record suggests that sex was a factor in setting Dr. Penk's starting salary.

The court must now address the issue of why Dr. Penk's salary was lower than the salaries of Dr. Nelson, Dr. Main, and Dr. Green between the years 1977 and 1983 and why Dr. Penk's salary was lower than the salary of Dr. Wright between the years 1979 an 1983. Dr. Penk contends the salary differences are a result of sex discrimination. As to the salary differences between Dr. Penk and Dr. Nelson, and Dr. Green, the Board contends the salary differences are the result of (a) length of experience in teaching; (b) length and

extent of service at WOSC; and (c)length of time since obtaining a Ph.D. degree. The Board contends that as to Dr. Wright, the differences between his salary and that of Dr. Penk are explained by market factors surrounding the demand for computer program educators.

After Dr. Penk began teaching at WOSC in the fall of 1973, the administration soon learned that Dr. Penk was a talented teacher and a willing worker. She was rewarded with salary increases to reflect her contributions to WOSC. Dr. Penk received the following salary increases between August, 1973 and fall, 1977:

August, 1973	7% raise (As high as anyone at WOSC received.)
January, 1974	5% raise (In recognition of the fact that Dr.Penk had received her Ph.D.

	degree in November, 1973.)
Fall, 1974	$1000 raise (Above the average faculty increase.)
Fall, 1975	12% raise (Above the average faculty increase.)
Fall, 1976	10% raise (Above the average faculty increase.)
Fall, 1977	Another increase.

From the fall, 1977 to 1983, Dr. Penk received equal or better percentages of salary increases than Dr. Nelson, Dr. Main, and Dr. Green (Dr. Penk 42%, Dr. Nelson 41%, Dr. Main 42%, Dr. Green 39%).

The major factors which account for salary differences are set out as follows:

e	Year of Service	Year of Terminal Degree	Year of Highest Rank
k	1973	1973	Assoc/1978
son	1970	1970	Prof/1982
n	1968	1970	Prof/1977
en	1969	1969	Prof/1974

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In summary, Dr. Nelson, Dr. Main, and Dr. Green came to WOSC several years before Dr. Penk. They were hired as regular, full-time faculty members, unlike Dr. Penk. Each has had substantially more teaching experience than Dr. Penk has had. Each received his terminal degree several years before Dr. Penk. Each is a full professor. In addition, Dr. Penk received equal or better percentages of salary increases than her comparators received from 1977 to 1983. The court concludes that the higher salaries paid to Dr. Nelson, Dr. Main, and Dr. Green from 1977 to 1983 are due to legitimate, non-discriminatory factors.

While the court finds that the salaries of Dr. Nelson, Dr. Main, and Dr. Green are explained by legitimate, job-related factors, the salary of Dr.

Wright presents the court with a different situation. The circumstances of Dr. Wright's employment are these: Prior to Dr. Wright's employment, WOSC offered a very minimal computer program. In order to enlarge the computer offerings and to develop a computer program, a position was advertised seeking a person with a Ph.D. degree in computer science. Dr. Penk served on the committee which drafted the position announcement. Dr. Penk believed that the requirement of a Ph.D. degree in computer science was "too high" a requirement. When no applicants with the Ph.D. degree in computer science applied, the requirement was changed to a Ph.D. degree in computer science education or the equivalent. Dr. Penk testified as to what happened next:

After the petitions were closed

> or the time for petitions to come in closed and they found that nobody had applied with the right qualifications, then one of Dr. Main's fishing buddies who had done some computer teaching, elementary computer courses at one of the two-year community colleges, was urged to apply.

(Tr. 7,192). The person described by Dr. Penk was Dr. Wright. Dr. Penk felt that her qualifications for the position were better than Dr. Wright's but she had not applied for the position because she did not have a Ph.D. degree in computer science and was not aware that the qualification had been modified. (Tr. 7,192).

Dr. Penk explained to the court that she began to teach computer courses in 1979, the same year that she was appointed to a full-time, tenured position and the same year that Dr. Wright was hired to begin the computer

program. Her salary that year was $18,099 and his starting salary was $19,500. Dr. Wright's salary seems disproportionate to Dr. Penk's salary, and it cannot be explained by any of the factors relevant to the salaries of any of Dr. Penk's other male comparators. Dr. Wright's 1979 salary of $19,500 also seems disproportionate to the salaries of Dr. Nelson ($19,454), Dr. Main ($20,502), and Dr. Green ($22,409). For example, Dr. Main received only $1002 more in salary than Dr. Wright in 1979, although he had had ten years of prior full-time service at WOSC, and he had received his doctoral degree seven years before Dr. Wright.

To bolster her claim of sex discrimination Dr. Penk testified that three people now teach computer science offerings at WOSC: two men, Dr. Wright

and David Olson, and one woman, Dr. Penk. Dr. Penk uses Mr. Olson as an example of WOSC's alleged sexist hiring practices. Mr. Olson was hired for the 1984-85 academic year as a computer science faculty member at a salary of $23,000. Dr. Penk's salary is $23,073 for the 1984-85 academic year. Mr.Olson had been Dr. Penk's student at WOSC, where he received an M.A. degree in 1982. He taught at Wallowa High School, Wallowa, Oregon, from 1978 to 1981; at Chemeketa Community College in Salem, Oregon, and the WOSC Continuing Education Service during 1981-82; at the University of Oregon as a graduate teaching fellow in 1982-83, and at Lane Community College as a part-time teacher before being hired by WOSC.

Dr. Penk explained that when she became aware of Mr.Olson's salary she

went to see her department chair, Dr. Broderson. Dr. Penk testified as follows:

> Q [By Ms. Reynolds] All right, and what did Dr. Broderson say?
>
> A He looked very pained; he said he didn't know what to say to me because anything he would say to me would sound like empty statements.
>
> All he could say was that there was nothing he could do about it. (Tr. 21,822).

Dr. Penk then went to see Dean Bergman. She testified:

> Well he [Bergman] told me the market was such that they had to pay Mr. Olson the same salary that they were paying me. They couldn't hire him at less.

Penk continued:

> A I told him that I was teaching in the same area as-- as Mr. Olson. I was also in computer science.
>
> Q And what did the dean say then?

> A Well, he said I was hired at a time when the market didn't value that particular -- that particular talent or that particular background.

(Tr. 21,822-823).

On cross-examination, Dr. Penk testified that she was on sabbatical leave during the selection process that lead to Mr. Olson's appointment and did not participate in or gain any direct knowledge of the salary negotiations with respect to any of the candidates. Dr. Penk testified as follows:

> Q [By Mr. Casby] Are you in a position to say that Dean Bergman was wrong when he said that that was the lowest price he could hire -- if I'm -- I realize I'm characterizing what you said. But nevertheless, was he incorrect in saying that he couldn't hire him, meaning Olson, at less --
>
> * * *
>
> A I have no idea.

(Tr. 21,840-841).

Since Dr. Penk's testimony about Mr. Olson was presented during plaintiff's rebuttal case, the Board did not and could not present any testimony to explain his salary.

As to Mr.Olson, the court will consider the testimony about him as some evidence of the allegedly sexist salary practices at WOSC. The court will not consider him as a comparator for Dr. Penk. The testimony about him was offered only in plaintiff's rebuttal case without an opportunity for the Board to respond. However, Dr. Penk's own testimony shows that market factors rather than sex discrimination affected Mr.Olson's starting salary.

As to Dr. Wright, the record does not really explain Dr. Wright's starting salary. There was evidence throughout this case that the demand for computer

programmers and scientists in the private sector required the colleges and universities to pay higher salaries in this area in order to compete with this demand. The court can and does assume that market competition was a factor in setting Dr. Wright's salary, but this court does not know the extent to which this factor influenced Dr. Wright's starting salary. The only facts the court has before it are (1) that Dr. Wright was hired to perform the specialized task of organizing the computer program offerings at WOSC, and (2) that Dr. Wright was a "fishing buddy" of Dr. Main who was hired after no one with the appropriate credentials applied. The court has the vita of Dr. Wright. He appears qualified to hold the position and Dr. Penk does not contend that he is unqualified. She simply

contends that she ought to be paid as much or more than he is paid, and the reason she is not is because of sex discrimination.

The court must first determine whether Dr. Wright is an equally qualified man who performs substantially the same job as Dr. Penk. Undoubtedly, Dr. Wright and Dr. Penk can be compared as to credentials. In that category, Dr. Penk may come out ahead. Qualifications, however, are insignificant if job content differs.

There is no direct evidence before this court of sex discrimination in salary against Dr. Penk. In order to infer intent to discriminate from the existence of wage differences, Dr. Penk must show substantial equality of the work performed. Spaulding v. University of Washington, 740 F. 2d 686, 700 (9th

Cir. 1984). For the court to properly resolve a claim that certain jobs are substantially equal the court must make a case by case analysis of the actual job contents of the positions.

Unfortunately, there was very little evidence presented regarding the specific job content of Dr. Penk's and Dr. Wright's positions. In her direct testimony, Dr. Penk stated:

> Q [By Mr. Willner] All right, and what was his responsibility?
>
> A He was hired to do some work with -- to organize the computer -- the computer science offerings on our campus.

(Tr.7,173-174).

In the period following Dr. Wright's hire, Dr. Penk began to expand her own knowledge in computer science and teach computer science offerings. She testified that in the 1984-85 academic year, she was assigned to teach two-

thirds in computer science and one third in mathematics. She explained:

> Q [By Ms. Reynolds] You testified that you are teaching two-thirds in the area of computer science. What specific areas within the computer science area do you teach?
>
> A I teach just about -- I'm assigned right now programming classes. But I -- I teach, and I will be teaching all areas.
>
> Q All right. And is there a particular area in the computer science area that you have special expertise in?
>
> A Yes, my -- since my Ph.D. is mathematical logic which is very closely related field to computers, my area is in the theoretical applications and problems of computer science.
>
> Q All right. And what level courses are those?
>
> A Usually they're the 400 level courses and graduate level courses.
>
> Q And is there anyone else on campus who is qualified to teach those particular courses?
>
> A No.

(Tr.- 21,821).

Based upon the evidence in this record, the court finds that the actual job content of Dr. Penk's position and Dr. Wright's position are not substantially equal. Dr. Wright was hired to perform the specialized task of organizing and expanding what was in 1979-80 a minimal computer program. In contrast, Dr. Penk evolved as a teacher of computer courses over a period of five years to her present position teaching computer science classes two-thirds of the time and mathematics classes one-third of the time. There is no evidence in this record that Dr. Penk assumed any administrative responsibility in the computer science area. There is no evidence in this record as to what courses Dr. Wright teaches, if any. The burden to prove that these positions are substantially

equal rests with Dr. Penk. If the court were presented with adequate facts relating to the actual job content of these two positions, such as type of classes taught, number of students taught, actual administrative responsibilities performed, it may well have found that the positions are substantially equal. Resting upon the terse explanation for Dr. Wright's position presented, Dr. Penk's assertion that the positions are substantially equal must fail.

The court concludes that market factors in new hirings and different job responsibilities account for the differences between Dr. Penk's salary and the salaries of Dr. Wright and Mr.Olson. There is no direct evidence before this court of sex discrimination in salary against Dr. Penk nor is there

any evidence from which to infer sex discrimination. Dr. Penk is not entitled to prevail on her salary claim.

DENIAL OF PROMOTION

Dr. Penk next contends that she was denied promotion to full professor in 1983 based upon her sex. Dr. Penk was promoted to associate professor effective the 1978-79 academic year. After four years in the rank of associate professor, she applied for promotion to full professor. She was denied promotion to full professor at that time. Dr. Penk testified that she was told that "since [she] was on educational leave at that time and was pursuing some research, they wanted to see the results of [her] research before promoting [her]." (Tr.7,190).

The mathematics section of her department recommended Dr. Penk for

promotion to full professor in 1983. The department as well as Dr. Broderson, the department chair, recommended Dr. Penk for promotion. Dr. Penk's promotion file then went from the department to Dr. Hermas Bergman, the Dean of the School of Liberal Arts and Sciences. Dr. Bergman did not recommend promotion at that time. In a memo to President Richard Meyer, Provost James Beaird, and the Senate Personnel Review Committee, Dr. Bergman praised Dr. Penk's academic qualifications, service to students, motivation, and commitment to her profession. However, Dr. Bergman concluded as follows:

> . . . Her record of scholarly research and publication and of other professionally related services is brief but impressive. Unfortunately, that record has changed little since she was promoted to Associate Professor in 1978. In my judgment, the evidence is lacking to show that she has

> moved sufficiently beyond the professional level she had reached in 1978 to justify her being promoted to Professor at this time.

(Def. Ex.4155). The Senate Personnel Review Committee, aware of Dr. Bergman's negative recommendation but purportedly acting independently, voted to deny Dr. Penk's request for promotion. (Tr.14,405-407). This committee included both men and women, including Dr. Gloria McFadden, a class member in this case.

The Board defends this action by explaining that when Dr. Gerald Leinwald became President of WOSC in 1977 he raised the standards for achieving promotion by placing greater weight on publications and professional growth than had been done before. Professional growth includes taking additional courses, participating in conferences, and other kinds of demonstrable indicia

of professional advancement as well as actual publications.

Dr. Penk does not dispute that she has not published any research since her doctoral thesis in 1975. Dr. Penk's vita shows that she made a presentation at a mathematics colloquium at Reed College in 1980. Several other professionally related activities are listed on her vita but not dated. The court concludes that from 1978, when Dr. Penk was promoted to associate professor, to 1983, when she applied for promotion to full professor, she had only one demonstrable indication of professional growth, and that was the presentation at a mathematics colloquium at Reed College in 1980.

Dr. Penk contends that the Board's explanation is not credible because two of her male colleagues, Dr. Norman Nelson

and Dr. James A. Barnard, were promoted to full professor without having publications or professional growth. Dr. Penk claims that the emphasis on publications and professional growth was not evenly applied and is no more than a pretext for sex discrimination.

The court will review the circumstances surrounding the promotions of Drs.Nelson and Barnard. Dr. Nelson was promoted to associate professor effective the 1973-74 academic year and to full professor effective the 1982-83 academic year. At the time of his promotion to full professor, Dr. Nelson had been in the rank of associate professor for nine years. Dr. Nelson's vita (Def. Ex.4159 A) shows no publications since 1974; two presentations in 1974; some consulting

and professional services; and numerous conferences.

Dr. Barnard was promoted to associate professor effective the 1975-76 academic year and to full professor effective the 1983-84 academic year. (Tr.14,410-411). At the time of his promotion to full professor, Dr. Barnard had been in the rank of associate professor for eight years. Dr. Barnard's vita (Def. Ex.4160 D) shows several publications, but none in refereed journals; several undated, unpublished research projects; some professional service; and a representation that Dr. Barnard averages one talk per year at mathematics meetings in the Northwest.

In deciding whether to promote an individual faculty member, an institution is entitled to consider any legitimate, work-related, non-

discriminatory factors it chooses. In the academic setting, the factors ordinarily relied upon in promotion considerations are teaching, service to the institution and community, and scholarly activities -- sometimes called professional growth. The institution is free to set its own standards of achievement for promotion and thereafter to change those standards without judicial interference provided those standards are set without regard to an impermissible bias such as sex.

As to the decision not to promote Dr. Penk, Dr. Bergman testified as follows:

> Q [By Ms.Abernethy] What was your recommendation in Dr. Penk's case?
>
> A My recommendation was that Dr. Penk not be awarded the rank of full professor at that time.
>
> Q What were your reasons for that recommendation?

A My reasons were based on the fact that there had not been or there was not in the file any evidence of scholarly research or publication during the period since she had been promoted to associate professor.

Q When you say scholarly research, are you referring to something besides publications?

A We are not adamant that research must be published.

Q When you say "we" you mean Western Oregon State College?

A The college, that's right. We-- if evidence can be shown that there has been substantial research, even if it has not been published yet, we take that into consideration.

Q What do you mean when you say you saw no evidence of scholarly research and/or publications?

A Nothing in the vita indicated that either was going on or had taken place during that period of time.

Q Well, why is that evidence important to you in reviewing promotion applications?

A We have several criteria for promotion. These are spelled out in various documents that have been presented to the court. They

include teaching, they include service to the institution, service to the community, service to the profession and they include also scholarly development or professional development might be a better term.

I don't want to overuse the word scholarly because, as an institution that emphasizes teaching, we do not put as much stress on research and publication as the universities do, for example.

Q Are you saying that you look for some evidence of professional growth?

A Yes.

Q Well, Dr. Penk testified earlier in this trial -- for the court, transcript page 7189 -- you told her you were denied a promotion or you were recommending against pro motion because you wanted to see the result of her sabbatical. Do you recall saying that to Dr. Penk?

A I remember the conversation. I do not recall it being -- that is my statement as being quite in that tenor.

What I recall saying is that it might be that the work that she would be doing during her upcoming sabbatical might provide the kind of material that would be evidence of professional growth.

Q Was your recommendation against promotion hinged at all on the fact that she was going to take a sabbatical next year?

A No. Had no relationship.

(Tr. 14,205-207).

As to the promotion of Dr. Barnard, Dr. Bergman testified as follows:

Q [By Mr. Willner] Do you know Dr. Barnard in the mathematics department?

A Yes, I do.

Q Was he promoted to full professor at the same time that Dr. Penk was denied?

A I believe it was the same year.
Q All right. And has he had any publications ----

A He has had -- excuse me.

Q First I will start in refereed journals since he's been on the Western Oregon State College faculty?

A I am not aware that he has published in refereed journals. He however has had a number of publications.

Q What kinds of publications if

there are none in refereed journals.

A Largely publications intended for school teachers, teachers of math.
Q All right. And did you consider the fact when you promoted Dr. Barnard and did not promote Dr. Penk that he had no refereed publications of any sort?

A I made note of that in my recommendations to the personnel committee but I pointed out that his publications and his activities in conferences with teachers, in papers that he had read and in the publication that he had done that he was very active professionally. And since his emphasis is in the field of teaching teachers, I felt that it was reasonable to recommend his promotion on that basis.

Q But he was being promoted not to professor of education but to professor of mathematics; isn't that true?

A That's true. But at Western Oregon State College the great majority of the majors in mathematics or even minors in mathematics are going to be teachers. They're getting certification.

(Tr. 14,219-220).

The Board's testimony regarding Dr. Nelson's promotion to full professor is

as follows:

> Q [By Ms. Abernethy] Is there a Dr. Nelson in your department?
>
> A [By Dr. Brodersen] Yes.
>
> Q Do you know how long it took him to be promoted?
>
> A Yes.
>
> Q I'm going to hand you what's been marked as 4159-J. Are these the notices of appointment for Dr. Nelson?
>
> A They are.
>
> Q With references to those notices of appointment, how long had it taken for Dr. Nelson to be promoted?
>
> A The first references to his position as associate professor of mathematics is for '73-'74.
>
> Q And then when did he become full?
>
> A The first reference to his rank as professor is '82-'83.
>
> Q Is that nine years?
>
> A Yes.

(Tr. 14,413).

This is basically all of the testimony that the Board offered

regarding Dr. Nelson's promotion although the Court has his vita. It appears that Dr. Nelson's publications and scholarly research did not exceed Dr. Penk's although Dr. Nelson had been in the rank of associate professor for nine years and Dr. Penk had been in the rank of associate professor for four years when each applied for promotion.

In addition, Dr. Penk testified as follows:

> Q [By Mr. Willner] All right, now, compare yourself with Dr. Nelson in terms of teaching, research and service. Do them one at a time.
>
> A Yes, he's a very dedicated teacher. But they tell me I'm an excellent teacher.

(Tr. 7,176).

> Q [By Mr.Willner] All right, and what was Dr. Nelson's research?
>
> A He has not done any research.
>
> * * *

> Q All right, how do you compare yourself with Dr. Nelson in terms of service?
>
> A He is a very dedicated man, and he does as much as he can. He is very ill, and I do not want to say any more about it. He's -- it's a very sad situation. But he's very dedicated.

(Tr. 7,177-178).

Court's Conclusion Regarding Promotion

While Dr. Barnard did not have a record of significant scholarly publications, his numerous professional activities qualify as professional growth. In the field of teaching teachers how to teach mathematics, he was and is very active. Dr. Barnard is not an appropriate promotion comparator for Dr. Penk. His record of demonstrable professional growth exceeds hers.

WOSC administrators did not follow their stated criterion of requiring demonstrable professional growth in

promoting Dr. Nelson. Even though Dr. Nelson had been in the rank of associate professor for nine years, the record shows that he had produced no publications, scholarly research or other demonstrable evidence of scholarly activity. The Board does not claim other wise.

Dr. Penk does not take issue with Dr. Bergman's position that she had not demonstrated the necessary professional growth to merit promotion. She offers no activity which would meet the requirement. Instead, Dr. Penk claims that the requirement of demonstrable professional growth is not a real qualification for promotion but only a pretext for discrimination against women. To support this position Dr. Penk points to Dr. Nelson, a man, who was promoted

without having to meet the scholarly activities requirement.

The court finds that demonstrable professional growth is a valid qualification for promotion at WOSC. The evidence strongly supports the Board's position that promotions are ordinarily evaluated in light of publications and other evidence of professional advancement. While this qualification is not simply a ruse to hide promotion decisions based upon sex, uneven application of such a qualification between men and women, provides some evidence from which the court can infer intentional discrimination.

The professional growth qualification for promotion was applied differently to Dr. Penk, a woman, than it was to Dr. Nelson, a man. While Dr. Nelson was promoted without

demonstrating any professional growth, Dr. Penk's promotion was deferred for that specific reason. The Board offers no other reason for the decision to promote Dr. Nelson. In fact, the Board offers no explanation for his promotion. While the Board points out the fact that Dr. Nelson had been in the rank of associate professor for nine years, there is no evidence before this court that this was a factor in the decision to promote him. In addition, there is no evidence of the influence of years in prior rank in the decision to promote an individual and, more importantly, in this context, there is no evidence that the qualification of professional growth is in any way influenced by the time spent in the prior rank. The court is confident in assuming that professional growth remains a qualification for

promotion regardless of the number of years since the last promotion.

Many courts have expressed concern that sex discrimination can be inconspicuous, but with grave effect. See, e.g. Griggs v. Duke Power Company, 401 U.S. 424 (1971) and Sweeney v. Board of Trustees of Keene State College, 604 F. 2d 106 (1st Cir. 1979). In recognition of the difficulty that women face in attempting to prove discrimination in employment decisions which involve many subjective evaluations, intentional discrimination can be inferred from just the type of inconsistent treatment that Dr. Penk has proven to this court.

Dr. Penk prevails on her promotion claim.

OFFICE SPACE

In her last claim of sex discrimination, Dr. Penk contends that she was required to share office space with other faculty members because of her sex. Dr. Penk testified as follows:

> Q [By Mr. Willner] From 1973 until after this lawsuit was filed, what kind of office facilities did you have?
>
> A Well, I had an office, and that's about all I can say. If any woman was hired at the time, she was usually put in to share the office with me. I've never had a -- my own office until a few years ago.
>
> In fact, one time there were three of us in the same office with two desks, while all the men had their own private offices. And at the time there were some vacant rooms that could have been made into additional offices for us, but they weren't.
>
> Q Did those -- that office space-- how many women were sharing that space?
>
> A Most of the time two, at one time three.
>
> Q All right.

A And my objection at the time was not that I was sharing the office with somebody else. I got along fine with the people that were there. But I was advising students and it's very unpleasant to have students come to talk to you about their personal problems and have somebody else listening in or have two other people listening in. (Emphasis added.)

One of the women that shared my office that one year was a heavy smoker. And I -- I'm very allergic to it. So I complained many times to Dr. Broderson that I'd have to do something about it. And they all looked very sad, "Yeah, it's a terrible thing, yeah, we'll see what happens, what we can do," and nothing happened.

Q Did any of the male faculty have -- not have private offices?

A No. They all had private offices, yes.

Q All right.

A In fact, at the time there was a private office closed. A man was on sabbatical. And I requested that they let me move into his office. And I was told that they didn't want to disturb his desk or books as he had them. So I couldn't use his office.

Q Incidentally, how many women in the mathematics section now?

A I'm the only one.

Q And for how long have you been the only one?

A I believe since 1980-81.

Q And during the time that you have been there, how long have the other women stayed? You said there have been some other women there on short time, fixed term appointments?

A Yes, but they stayed there from 1973 to 1980-81. There was always another person, another woman teaching part-time, fixed term appointment.

Q And different ones during that period of time?

A Excuse me.

Q Were they changing?

A Once they changed.

(Tr. 7,171-173).

In response to Dr. Penk's complaint and testimony about office space, Dr. Broderson, the department chair, testified as follows:

Q [By Ms. Abernethy] . . . There's been testimony in this case with regards to the office space afforded Dr. Penk. Do you recall during the years Dr. Penk was employed her discussing with you her office space situation?

A Yes, I do.
Q What do you recall about those discussions?

A I recall comments about heating and cooling situations in her office which is in Arnold Arms, and the building, until it was recently insulated, was very cold during the winter, very hot during the summer.

I recall conversations with her about difficulties of her office mate, Claudia Aldrich, smoking and that bothering Dr. Penk.

Q With regard to the heating and cooling, what's the name of the building again?

A Arnold Arms.

Q Are there other offices in Arnold Arms besides the one that was assigned to Dr. Penk?

A Yes.

Q Are there other offices of people in your department in that building?

A Yes.

Q Is the whole department in that building?

A The mathematics section is primarily in that building.

Q And what, if you know, is the heating and cooling situation of other offices for people in the mathematics section who had ----

A Also uncomfortable.

Q Was the heating and cooling problem throughout the entire building?

A It's not uniform, yes.

Q With regard to the problem of Ms.Aldrich's smoking, when, if you recall, did Dr. Penk bring that problem to your attention?

A I do not recall when.

Q What if any efforts did you take to rectify that problem?

A I do not remember taking any concrete action to rectify the problem.

Q Why not?

A I had hoped that together as office mates they would be able to resolve the situation.

Q When did Dr. Penk receive an office -- her own office?

A As a factual entity, when Sara McCabe was not hired part-time, Anna had and has that office. During the intervals that Sara McCabe has been part-time faculty, she and Anna have continued to share an office.

Q I believe there was testimony by Dr. Penk that when you --she received a tenure and tenure track position effective '79-'80, that she had her own office. Is that different from your recollection?

A In this regard: I believe since then on a couple of occasions Sara McCabe has been employed and has used part of that office that Anna occupies.

Q Well, can you describe for the court generally what the office situation is like for the persons in your department?

A Generally speaking, we'd have individual offices in some cases in the natural sciences building, not Arnold Arms. People share an adjoining resource or research area and have somewhat smaller adjoining office spaces.

Q Was there an office available for you to give to Dr. Penk in the earlier years when she was a part-time person?

A Yes, I believe that there was.

Q Well, why didn't you give it to her?

A I did not understand there to be a difficulty.

Q What was your understanding of the difficulty?

A One due to the physical problems of heating and cooling.

Q And was there a time subsequent to that when you became aware that there was a difficulty about the sharing or did you ever become aware of that difficulty?

A I did not become aware of it.

(Tr. 14,430-433).

In September, 1979, Dr. Penk received a full-time, tenure track position, and, within a reasonable time thereafter, her own office space. Although she was first hired at WOSC in 1973, prior to September, 1979, she was a fixed-term and frequently a part-time employee with no guarantees of continuing employment from one term to the next. Dr. Penk was not entitled to the same

office space as tenure track or tenured faculty until she became a tenure track and tenured faculty member in 1979. Then she received her own office space.

More importantly, there was office space available to Dr. Penk had she presented her grievance about space directly to Dr. Broderson. He believed her complaint to be about inadequate heating and cooling -- over which he had no control and from which both men and women suffered -- and about an office mate who smoked -- a problem which Dr. Broderson wanted the office mates to work out together. Dr. Broderson's position was reasonable.

As to Dr. Penk's testimony that she needed her own office space for student advising and consulting, the following testimony is relevant:

> Q [By Ms. Abernethy] And up to the point when you received tenure, 1979, isn't it true that you were held -- told directly by the dean that for those quarters when you actually taught full time, I believe there were some quarters when someone went on a sabbatical or-- and you were put on 1.0 FTE, isn't it true in regards to those periods that you were teaching full time, you were directly told that your responsibilities were to teach and you weren't required to do student advising and serve on committees and such?
>
> A It was.

(Tr. 7,206).

Dr. Penk cannot prevail on her claim of sex discrimination regarding office space.

Dr. Penk Footnotes

1. Western Oregon State College was called Oregon College of Education until the early 1980's. The court will use the acronym "WOSC" for this institution for all times discussed.

2. These are figures submitted in plaintiff's exhibit 209(c). The court is unable to determine whether the 1978 and 1979 salaries are in fact the same. Plaintiff's exhibit 209A lists Dr. Penk's salary for the 1978-79 academic year at $17,153, but provides no salary figures for her comparators.

3. Dr. Penk submitted no proposed findings as to Dr. Green's starting salary. The court accepts the Board's argument based on Dr. Broderson's testimony that Dr. Green is not a reasonable comparator for Dr. Penk as to starting salaries.

DR. MARY ANN PETRY

Dr. Mary Ann Petry, a former professor of art and art education at Western Oregon State College (WOSC), who was terminated in a "reduction in force" procedure in 1983, claims that she was discriminated against because of her sex in that (1) she was hired without tenure while male professors in the same department who were less qualified or equally qualified had tenure; (2) she was treated less respectfully than males, was not included in informal activities as were males, and was not allowed to participate in certain classes as were males; and (3) she was denied tenure in 1982 although she was fully qualified to become a tenured faculty member. Dr. Petry intervened in this action as a named plaintiff without filing a charge

with the Equal Employment Opportunity Commission.

In 1977 Dr. Petry was hired without tenure as a full professor of art and art education at WOSC (then known as Oregon College of Education). Dr. Petry has a B.A. degree in English from St.Johns University, Jamaica, New York (1953); an M.S. degree in elementary education from Fordham University, The Bronx, New York (1958); an M.F.A. degree from Pratt Institute, Brooklyn, New York (1966); and a Ph.D. degree in art education from New York University, New York (1971). She taught elementary and high school art from 1950 to 1961 and was chair of the Art and Art Education Department at Molly College from 1961 to 1973. From 1973 to 1974 Dr. Petry was an assistant professor at the University of Delaware, and from 1974 to 1977 she was an

associate professor at the State University of New York at New Paltz, New York.

Dr. Petry specializes in printmaking. She has exhibited her work in the Brooklyn Museum, the National Historic Society, and numerous other galleries. She is Pacific Regional Director of Higher Education for the National Art Education Association and a board member of the Alliance for Arts Education.

In 1978 Dr. Petry joined the Department of Creative Arts at WOSC in the art area. At that time Dr. Ron Wynn was chair of the department and James Mattingly was the art area coordinator. At the time of her hire then-President Leonard Rice wrote to Dr. Petry regarding her initial conditions of employment stating that she would be

evaluated for tenure after five or six years of continuous employment. Dr. Petry was considered for and denied tenure in 1982. In 1983 Dr. Petry was considered for and granted tenure.

TENURE AT THE TIME OF HIRING

Dr. Petry claims she was denied tenure at the time of hire because she was a woman. However, Dr. Petry herself testified that she knew of no one at WOSC who was hired as a full professor with tenure. Dr. Wynn, the department chair; Dr. James Beaird, the Provost; and Dr. Gerald Leinwald, the President; all testified that they knew of no one hired as a full professor with tenure at WOSC. Furthermore, at the time she was hired Dr. Petry was notified that she would be considered for tenure after five or six years of continuous employment. There is no evidence before the court to suggest

that this was improper or motivated in any way by her sex. Dr. Petry is not entitled to prevail on her claim that she was hired as a full professor without tenure while male professors in the same department who were less qualified or equally qualified had tenure.

UNPROFESSIONAL TREATMENT

Dr. Petry also contends that she was discriminated against on the basis of sex in that she was treated unprofessionally and with less respect than her male colleagues. This contention centers around the actions of the art area coordinator, Mr. Mattingly. The undisputed evidence is that after Dr. Petry's election as chair of the curriculum committee, Mr. Mattingly stated, "It's about time we have a broad to head this committee."

Dr. Petry also claims that she was generally excluded from informal activities of the male faculty members. She contends that despite the fact that Mr. Mattingly frequently shared courses with male faculty members, when Dr. Petry asked him if she could teach a printmaking course one summer session, he replied, "Over my dead body." Mr. Mattingly wrote that Dr. Petry was "not allowed to teach in [his] printmaking studio."

The Board concedes that Mr. Mattingly made sexist remarks and acted unprofessionally toward Dr. Petry. Provost Beaird, Dean Hermas Bergman, and Dr. Wynn each acknowledged in his testimony that Mr. Mattingly had acted unprofessionally toward Dr. Petry. The Board contends, however, that when the WOSC administration became aware of Mr.

Mattingly's unprofessional treatment of Dr. Petry it took action to correct Mr. Mattingly's behavior.

Dean Bergman testified that he had two meetings with Mr. Mattingly in the summer or fall of 1981. Dr. Wynn and Dr. Beaird were present at one meeting, and Dr. Bergman met with Mr. Mattingly alone once. Dr. Bergman testified that he spelled out what he thought were errors Mr. Mattingly had made in his attempts to evaluate Dr. Petry and made clear to Mr. Mattingly what he expected of him in the future. Dr. Bergman testified that he specifically talked to Mr. Mattingly about his sexist remarks and instructed him to be more professional in his approach to Dr. Petry.

Dr. Wynn testified that he spoke privately to Mr. Mattingly about his

unprofessional behavior and that since that conversation he has had no indication that Mr. Mattingly has acted unprofessionally toward Dr. Petry.

Dr. Beaird testified that he discussed the problem that had occurred between Mr. Mattingly and Dr. Petry with Dr. Bergman and subsequently with Mr. Mattingly. He testified that he told Mr. Mattingly to act more professional in his approach to evaluating Dr. Petry and that he believed that Mr. Mattingly had changed his behavior as a result of these conversations.

A discriminatory work environment may amount to discrimination with respect to the terms, conditions, or privileges of employment. In Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), the court was faced with a situation where the employer's supervisory personnel had

created a substantially discriminatory work environment but the employee had not lost any tangible job benefit as a result of the discrimination. The court held that the employee could bring an action under Title VII and explained:

> The relevance of these "discriminatory environment" cases to sexual harassment is beyond serious dispute. Racial or ethnic discrimination against a company's minority clients may reflect no intent to discriminate directly against the company's minority employees, but in poisoning the atmosphere of employment it violates Title VII. Sexual stereotyping through discriminatory dress requirements may be benign in intent, and may offend women only in a general atmospheric manner, yet it violates Title VII. Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional

> assault on an individual's innermost privacy, not be illegal?

641 F. 2d at 945. See also Gray v. Greyhound Lines, East, 178 U.S. App. D.C. 91, 545 F. 2d 169, 176 (D.C. Cir. 1976) (pattern of racial slurs violates Title VII rights to non-discriminatory environment); United States v. City of Buffalo, 457 F.Supp. 612, 631-635 (W.D. N.Y. 1978) (black employees entitled to work environment free of racial abuse and insult); Compston v. Borden, Inc., 424 F.Supp. 157 (S.D. Ohio 1976) (demeaning religious slurs by supervisor violate Title VII); Steadman v. Hundley, 421 F.Supp. 53, 57 (N.D. Ill. 1976) (racial slurs may lead to Title VII violation).

While the facts in this case support Dr. Petry's claim that she was subjected to a discriminatory environment, this

case differs in a very important way from Jackson and the cases which follow it. In Jackson, the court found that the employer could be held liable for the discriminatory acts of its supervisory personnel because it had full notice of harassment committed by the agency supervisor and did "virtually nothing to stop or even investigate the practice."

Here WOSC administrators took action to correct Mr. Mattingly's behavior. There is no evidence that Mr. Mattingly continued to act "unprofessionally" toward Dr. Petry after Dr. Bergman, Dr. Wynn, and Dr. Beaird told him that his behavior needed to be modified. While the court finds that Dr. Petry was treated unprofessionally by Mr. Mattingly, the court further finds that the Board took reasonable and successful steps to correct the discriminatory

behavior and therefore cannot be held liable for Mr. Mattingly's actions under these circumstances.

DENIAL OF TENURE IN 1982

Dr. Petry contends that she was discriminated against on the basis of her sex in that she was not granted tenure in 1982, although she was fully qualified to become a tenured faculty member. Dr. Petry claims that she was as equally qualified to be granted tenure in 1982 as she was in 1983 when she was in fact granted tenure. She also claims she was granted tenure in 1983 because she joined as a plaintiff in this suit.

In 1982, Provost Beaird recommended to President Leinwald that Dr. Petry's application for tenure be deferred for a year. Dr. Beaird testified that the reason for that recommendation was that serious questions had been raised in the

course of deliberations in the Senate personnel review committee (the college level review committee) regarding Dr. Petry's shallow treatment of a particular period of art history. Dr. Beaird claims these serious questions were sufficient to convince him that the college should take another year to review Dr. Petry's teaching performance. Dr. Beaird testified that the questions were raised by one of Dr. Petry's colleagues who was a member of the Senate personnel review committee and a member of the teaching team that taught an inter-disciplinary course with Dr. Petry. Dr. Beaird also testified that Mr. Mattingly's problems with and evaluation of Dr. Petry had no influence upon the tenure decision. Dr. Beaird explained that by the time of the 1983 tenure review he was satisfied and the

Senate personnel review committee was satisfied that there was no foundation to the previous year's charge and that Dr. Petry was qualified to receive tenure. Dr. Beaird testified that he did not know whether Dr. Petry was a member of the class or a plaintiff in this case when the 1983 decision was made.

President Leinwald testified that he tried to make it more difficult for faculty to obtain tenure after his arrival in 1977. He felt there was an "unhealthy balance" in some departments because too many of the faculty were tenured. Dr. Leinwald wanted tenure decisions to be subject to the most severe and most critical kind of peer review and not be a mere "back scratching exercise." Dr. Leinwald wrote and circulated to the faculty in 1980 a

document entitled "The Award of Tenure" which reflects this view.

In 1982 Dr. Petry's tenure application file contained both negative and positive evaluations from students and from other faculty members. Several faculty members wrote negative evaluations and several students signed an unsolicited negative student evaluation which was included in her file. The personnel review committee for the creative arts area had recognized that there were both negative and positive evaluations of Dr. Petry and had reservedly recommended to the Senate personnel review committee that Dr. Petry be granted tenure.

Several of the defendant's witnesses testified that Mr. Mattingly's evaluations of Dr. Petry did not influence the decision not to grant her

tenure in 1982. Dr. Bergman testified that he had recommended Dr. Petry for tenure in 1982 because Mr. Mattingly had treated her unprofessionally, making it difficult to judge her qualifications. Dr. Bergman testified that despite the fact that he did not consider Dr. Petry a particularly strong candidate for tenure in 1982 he wanted to "bend over backwards" because of Mr. Mattingly's treatment. In 1983, Dr. Bergman recommended that Dr. Petry be denied tenure based upon problems she had with supervising teachers and because of student complaints.

CONCLUSIONS OF THE COURT

Dr. Petry's qualifications for tenure did not change significantly from 1982 when she was denied tenure to 1983 when she was granted tenure. The decision to defer Dr. Petry's request

for tenure in 1982 was made at the Senate personnel review committee level and was based upon the objection of one member of the committee who was a colleague of Dr. Petry in the art area. Dr. Beaird made no further investigation of that objection before he submitted his recommendation to the President that tenure be denied. By 1983 Dr. Beaird had determined that the objection made in 1982 was no reason to deny tenure to Dr. Petry. Dr. Beaird did not explain what further investigation he had done or what factors influenced him to change his mind. Dr. Beaird rarely recommended to the President that tenure be denied and in several instances further investigation was promptly undertaken before denying tenure.

The court finds that no reasonable explanation has been given by the

defendant for denying Dr. Petry tenure in 1982 in light of the fact that she was granted tenure in 1983 with exactly the same concerns and deficiencies that had been pointed out in 1982. The court concludes that the unprofessional evaluations by Mr. Mattingly and the discriminatory work environment created by Mr. Mattingly's actions influenced the decision to defer the grant of tenure in 1982.

Dr. Petry is entitled to prevail on this portion of her individual claim.

SOUTHERN OREGON STATE COLLEGE

ASHLAND, OREGON

Rosemary Dalton

Sherry Ann McLoud Mihel

ROSEMARY DALTON

Rosemary Dalton,[1] a resident of Boston, Massachusetts, contends that she was discriminated against because of her sex while she was employed as the director of the Women in Transition program at Southern Oregon State College (SOSC) in that (1) she was assigned the title of research assistant rather than the rank of instructor, from 1977 to 1979 while equally qualified men who served as directors of various programs were assigned academic ranks, and (2) from 1977 to 1980 she was paid disproportionately less than Dr. William Wanger, the Director of Counseling, considering his qualifications and responsibilities. Ms. Dalton did not file a complaint with the Equal Employment Opportunity Commission.

Ms. Dalton received a B.A. degree in

political science in 1975 and an M.A. degree in general studies with an emphasis in psychology in 1976, both from SOSC. Prior to beginning her studies at SOSC, Ms. Dalton had worked in office management, community relations, communications, group encounters, counseling, fund-raising, and grant-writing. Much of her work was centered around interracial problems in Detroit, Michigan.

RANK CLAIM

Ms. Dalton first became employed at SOSC on a part-time basis in the admissions office during the 1975-76 academic year while she was a graduate student. She received a work-study grant and coordinated the Lifelong Learning Program. During this 1975-76 academic year Ms. Dalton, Dean of Students Mary Christlieb, Admissions

Director Ellen Blazac, and Director of the Counseling Center Dr. Bill Wangen, discussed ways in which to hire Ms. Dalton full-time as a counselor for women students who were returning to college. Dean Christlieb applied for and obtained federal Comprehensive Education and Training Act (CETA) funds which were matched by SOSC in order to fund a position for Ms. Dalton during the 1976-77 academic year.

With the CETA funds and the matching funds, Ms. Dalton was hired as Learning Resources Coordinator and Coordinator of the Women's Program, later known as Women in Transition. Although her title changed between 1976-77 and 1977-78, and although the emphasis in her responsibilities changed slightly, Ms. Dalton's major responsibilities from September, 1976, through June, 1980,

when she resigned, included the following:

1. Personal, career, and academic counseling for re-entering women students and students contemplating returning to college;

2. Teaching one study skills class per term;

3. Counseling and/or training faculty on the needs of returning women students;

4. Conducting workshops;

5. Engaging in community outreach for recruiting women students.

6. Directing the Women's Program -- later called Women in Transition.

Under a separate employment contract, she coordinated 2 - Ms. Dalton the Women's Summer Forum in 1978 and 1979. From 1978 to 1981, Ms. Dalton was a member of the Governor's Commission

on the Status of Women for the State of Oregon, and for one year she was the elected chairperson of that committee.

During the 1976-77 academic year, Ms. Dalton's title was "Psychological Assistant," a title which reflects CETA requirements. The record is a bit confusing, but in the 1977-78 and 1978-79 academic years, her title was either Research Assistant or Graduate Assistant. In 1979-80 she became an instructor, an academic rank.

Ms. Dalton claims that she was discriminated against because she did not receive the rank of instructor when she became a full-time employee in the fall of 1976. Both Dr. Wangen and Dean Christlieb had petitioned then-President James Sours for the rank of instructor for Ms. Dalton in the fall of 1977. President Sours denied that request. Ms.

Dalton claims that he denied that request because she is a woman. Dean Christlieb testified as follows:

> Q [By Mr. Lidz] Do you know why the president did not award her instructor rank in the fall of '77 and '78?
>
> A We were going through at that time one of the most serious of our budget cuts. There had been several readjustments in the administration. Three, at that time, deans' positions were eliminated. That was not a very good time to consider creating a new position in the administration rank even at instructor level when you are firing faculty and other administrators.

(Tr. 17,387).

Dr. Sours testified as follows:

> Q [By Mr. Lidz] . . . What was happening to the number of faculty and administrators during this period of time in 1976-77 and '77-78?
>
> A I don't recall specifically any particular year, but I know that from 1973 forward through the rest of my administration we surrendered a number of FTE

> positions, both faculty and civil service, to a total I think of about 31, as I recall. And we were making reductions. We were not filling certain vacancies and finding other ways to retrench our spending. And several programs floundered for really lack of adequate funding.
>
> We had to abandon, for example, the Southern Oregon Regional Center, Regional Studies Center. We did not have proper funding for even the academic programs, the purchase of equipment for laboratories and things of that sort.

(Tr. 17,599-600).

In support of her claim that she was denied academic rank because of her sex, Ms.Dalton compares her position to the positions of five men in the student services area who had academic rank and directed programs: Director of Housing; Director of Financial Aids; Director of Career Planning and Placement; Director of the Veterans Program; and Director of

Counseling. Each of these men was hired after searches to direct established programs. Funds from the institution were budgeted for the salaries of the directors of these programs. Ms. Dalton was hired on temporary federal funding, without a search, to design and implement a program which grew out of her work for her masters degree. Simply because each of the male program directors has the title "Director" does not mean that each has responsibilities comparable to those of Ms. Dalton. The court does not know when each of these programs was started, or the circumstances surrounding its creation or each of the directors' responsibilities. There is also insufficient evidence before the court to make a full comparison between Ms. Dalton and her named comparators in terms of prior

experience and academic credentials. Furthermore, others with the title of "Director" at SOSC did not hold academic rank. For example, the man who counseled veterans returning to college did not have academic rank but was called a director. Ms. Dalton bears the burden of proving her claim of discrimination in rank assignment.

Dr. Sours' testimony that he was not certain that SOSC could fund Ms. Dalton's position after the CETA grant expired and that he did not want to commit the college to funding for a new regular faculty position at a time when other faculty were being terminated is credible. This reason for declining to place Ms. Dalton into an academic rank is a legitimate non-discriminatory reason and is not a pretext for sex

discrimination.

SALARY CLAIM

Ms. Dalton next contends that while she should not be paid as much as Dr. Wangen, the Director of Counseling, the discrepancy between their salaries is too great and that the reason is sex discrimination. Dr. Wangen received a bachelors degree in education and speech therapy in 1963; a masters degree in guidance and counseling in 1967; and an Ed.D. degree from Oregon State University in 1970. He was hired at SOSC in 1970 at a salary of $13,608. He serves on a 12 month contract.

Ms. Dalton came to SOSC in 1974 as an undergraduate student. She received a B.A. degree in political science in 1975 and a masters degree in general studies in 1976. Her salary is based on a 9 month contract. As Director of the

Counseling Center, Dr. Wangen was responsible for all of the counseling staff as well as its budget. He supervised two other part-time counselors who had faculty rank. Ms. Dalton supervised no one with faculty rank or professional training. Dr. Wangen taught counseling courses at the upper division and graduate level, as well as general psychology courses. Ms. Dalton had no professional credentials as a counselor and no advanced degree in counseling. She was not able to teach the kind of courses that Dr. Wangen taught. In summary, Dr. Wangen had substantially more education, more experience, and more responsibilities than Ms. Dalton. He is certainly entitled to a substantially larger salary than she.

In the fall of 1977, Ms. Dalton's salary was $8,600 for a 9 month appointment. By April 1, 1978, her salary was $9,234. She received an out-of-the-ordinary raise of $3,000 in September, 1978, which brought her salary to $12,234. As of December 1, 1978, she received $12,863. For the 1979-80 academic year, the year she received academic rank as an instructor, her salary was $13,518. This sum was above average when compared to the salaries of other instructors.

Dean Christlieb testified as follows:

> In light of what academe pays for experience and degree, that [salary of Ms. Dalton] would be appropriate. That's the way salaries are set. Number of years of experience, number of years in rank on that particular campus, degree earned, number of years the degree has been held. That's how you get your pay.

(Tr. 17,421).

Dean Christlieb also testified that she felt the salary difference between Ms. Dalton and Dr. Wanger was "commensurate." Dean Christlieb was a credible witness.

The court concludes that Ms. Dalton cannot prevail on her individual rank and salary claims.

Rosemary Dalton Footnotes

1. Ms. Dalton's testimony was received by deposition because of her health.

SHERRY ANN MCLOUD MIHEL

Sherry Ann McLoud Mihel, who resigned her position as assistant professor of library science at Southern Oregon State College (SOSC) in early 1984, claims that she was discriminated against because of her sex in that she was hired at the rank of instructor in September, 1978, while George Mihel, an equally qualified man in substantially the same position, was hired at the rank of assistant professor in September, 1978. She also claims that on the basis of her sex she received a lower salary than George Mihel at the time they were hired and thereafter. Ms. Mihel intervened in this action as a named plaintiff without filing a charge of sex discrimination with the Equal Employment Opportunity Commission.

Ms. Mihel received a B.A. degree with a double major in history and French from Western Washington State College (now Western Washington University) in 1969; and a masters degree in library science from the University of Oregon in March, 1971. She was then employed as children's librarian at the Bellingham Public Library (three months) and at the Whatcom County Public Library (5 years). In September, 1976, she began work on a doctoral degree in educational media at the University of Washington. By June, 1978, she had completed all of her course work for her doctoral degree and had taken and passed all of the required examinations. She was then in a status known in the academic community as ABD (all but dissertation). During the time she was studying for her doctorate, she was a teaching assistant

at the University of Washington.

In the early spring of 1978, SOSC issued a "Vacancy Notice," an announcement of a position opening for an instructor of library science, a fixed-term, nine months position with a salary range from $12,000 to $13,000, depending upon experience. The educational preparation required was MLS (master of library science) and M.Ed. (master of education) "preferred." A copy of that vacancy notice is attached to and follows this page. Ms. Mihel applied for this position.

In a letter dated June 13, 1978, in which he offers the position to Ms. Mihel, Dr. James K. Sours, the president of SOSC, advised her as follows:

> "You will be reviewed for promotion to Assistant Professor upon your completion of the doctorate or during your

fourth year of employment at Southern Oregon State College.

A copy of that letter is attached to and follows the copy of the vacancy notice. Before accepting the offer of employment, Ms. Mihel inquired about the salary level. She was told that no funds were available to hire anyone for this position above the rank of instructor despite the fact that with her ABD status she may have been scholastically overqualified for the position. Ms. Mihel then wrote a letter to Dr. Sours on June 21, 1978. She stated as follows:

> "I am pleased to accept the position of instructor in library science which you have offered me in your letter of June 13, 1978. I have carefully read your letter and attachment 1. I have no questions concerning the information supplied and find the terms and responsibilities presented therein agreeable. I have enclosed all the forms that constitute attachment 2.

BEST AVAILABLE COPY

Table 1

VACANCY NOTICE

SOUTHERN OREGON STATE COLLEGE
Ashland, Oregon 97520

An Equal Opportunity Employer

TITLE OF VACANCY Instructor of Library Science (Rank or professional title) Library (Department or Division)

TYPE OF APPOINTMENT (See 6 and 7 below) fixed term--nine months

EXPERIENCE REQUIRED Experience with Children's Literature, teaching or library experience of at least two years. Also minimum of two years experience in school media center.

EDUCATIONAL PREPARATION REQUIRED MLS and M.Ed. preferred

DESCRIPTION OF POSITION Responsible for children's literature instruction and library processes at the elementary and secondary school level. Also included are book collection coordination for education, children's literature, and library science.

DETAILS ABOUT ABILITIES REQUIRED Includes considerable knowledge of children's literature, the classic titles, abilities to critically analyze the literature and some ability to teach storytelling. Classroom experience in this subject area would be desirable.

SALARY RANGE FOR POSITION $12,000-$13,000, depending upon experience

CLOSING DATE FOR FILING OF APPLICATIONS FOR THIS VACANCY IS April 15, 1978

COLLEGE REPRESENTATIVE TO BE CONTACTED: Richard E. Moore, Library Director
Southern Oregon State College
Ashland, Oregon 97520 (503-482-6445)

All qualified applicants will be considered regardless of age, sex, race, color or minority groups, national origin, religion or handicap

FACTS ABOUT THE COLLEGE AND NATURE OF THE APPOINTMENT TO FILL THE VACANCY

1. Annual operating budget -- 1977-78 $9,300,000 (estimated)
2. Student-teacher ratio, approximately 18 to 1
3. The salary range for the instructional faculty of Southern Oregon State College for 1977-78 is $10,000 to $25,128 for instructors through professors on 9-month appointments
4. Organization -- one of eight campuses of the Oregon State System of Higher Education
5. Instructional load -- average of 12 credits per term plus committee work and student advising
6. Annual contract period -- 9 months (September 16 - June 15);12 months (July 1 - June 30)
7. All appointments are to be made on a fixed term basis which may be renewed, or may at a later date to be changed to a tenured track appointment.

BEST AVA

Table 2

SOUTHERN OREGON STATE COLLEGE

Office of the President / 482-6111

June 13, 1978

Sherry Ann McLeod
7940 - 10th, S. W.
Seattle, Washington 98106

Dear Ms. McLeod:

Upon the recommendation of Mr. Richard Moore, I am pleased to be able to offer you a position on the faculty of Southern Oregon State College. The position is that of Instructor in Library Science, at a salary of $13,000 for the nine-month academic year 1978-79. This is a one-year fixed term renewable appointment on the non-tenure track to a permanent position assigned to the Library Science Department. It is anticipated that the position will be renewed unless you are given notice to the contrary during the spring of 1979. You will be reviewed for promotion to Assistant Professor upon your completion of the doctorate or during your fourth year of employment at Southern Oregon State College. (COURT NOTE: The above underscoring was not on the letter received by Ms. Mihel.)

I hope very much that you will be able to accept this offer. Ashland offers many fine physical and cultural amenities and is, indeed, a fine place in which to live. We are very proud, at Southern Oregon State College, of our faculty and students, and of our efforts to excel in our teaching mission. We believe you can make a fine contribution to our programs. Your written acceptance of this offer, addressed to me, will constitute the necessary contract for both of us. I will appreciate receiving such assurance no later than 20 days from the date of this letter and our contract.

Enclosed are some supplementary items for your information.

In Attachment Number 1, we have identified the categories of performance for which members of the faculty are specifically responsible. Please let me summarize these briefly for you herein:

1. Scheduled and unscheduled teaching.
2. Academic program advising.
3. Posting and maintaining regular and appropriate office hours.
4. Specific and general scholarly projects.
5. Professionally related public service.

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Table 3

6. Departmental, Divisional, School and Institutional Administrative and committee activities.
7. Student support service activities.
8. Course and curriculum planning.
9. Research and development.
10. Professional selfimprovement planning.

You will find each of the foregoing further detailed in Attachment 1.

The Administrative Rules also require me to inform you that you are expected to be formally evaluated, at least once in each course for one quarter, and also to be evaluated by your peers. All applications for tenure and promotion must be accompanied by tangible evidence thereof. Remedial programs, now in the developing stages, are available for those who demonstrate a need for instructional improvement.

Enclosed as Attachment Number 2 are certain personnel forms which, if you accept our offer, you should complete and return with your letter of acceptance, addressed to me.

I apologize for the length and formidability of this letter. It is our hope that we have not diminished your interest in joining the staff of a very fine and developing institution.

I look forward to your early, and favorable, response.

Cordially,

James K. Sours

James K. Sours
President

bs

Attachments

cc: Mr. Lewis
Mr. Seely
Ms. Westgaard
Dr. Ettlich

Mr. Mihel accepted the position and became employed at SOSC on September 16, 1978 at an annual salary of $13,000, the highest salary listed in the vacancy notice.

Shortly after becoming employed -- during fall term of 1978 -- she applied for a promotion in rank from instructor to assistant professor, despite the fact she had not completed the Ph.D. degree or served four years[1]. She was promoted from instructor to assistant professor effective the 1979-80 academic year and received an increase in salary. She was also appointed chair of the Department of Library Science effective the 1979-80 academic year. She was an excellent employee. There is no issue in her case about work skills or production. She received a 5% raise to accompany her promotion in 1979 and an additional

equity raise in 1980, as well as annual percentage of salary increases. Her claim relates only to her initial starting salary and rank.

Ms. Mihel uses George Mihel as a comparator to support her pay and rank claims.[2] Ms. Mihel testified that George Mihel and she were approximately the same age; that he received a B.S. degree in Education in 1970 from, "A university in Illinois. I forgot which one"; that he received a masters degree in Education in 1972; and that he was also in the status known as ABD (all but dissertation) when he was hired. Prior to coming to SOSC, George Mihel had taught for five years in junior high and one year as a teaching assistant at the university level. The position for which George Mihel applied was advertised as an assistant professor position with a

salary range between $14,000 and $16,000.

Dr. Ernest Ettlich, Dean of Academic Affairs, testified as follows:

> Q [By Mr. Lidz] Why was the position advertised at the assistant professor level?
>
> A In education you're dealing with a license year program. It's a professional program, and as I indicated in my affidavit, that professional experience is a requirement for faculty who are teaching in that area, and you'll see that reflected under the requirement of three to five years in a public school or support service area. So that the assistant prof rank was assigned in recognition that the doctorate is the normal entry degree for a person in education and that person would have to have professional experience. In some cases, we would appoint the individual with the ABD, but in no case without the professional experience.
>
> Q And what kind of courses would one teach at this position?
>
> A He'd be teaching in the professional education program, so it would be all upper

division and graduate.

. . .

Q Now, in terms of the teaching responsibilities, were the two positions [Sherry Mihels' and George Mihel's positions] involved teaching at a similar level or at different levels?

A Well, the -- the children's literature courses would be a part of the basic certification program in elementary. So it would be at the junior or senior level. The library science course that Professor Sherry Mihel would have taught would have been probably at the 400 level, whereas, Professor Mihel would be teaching likely one 500 level course every term.

Mr. WILLNER: You are talking about him, now?
THE WITNESS: Professor George Mihel.

Mr. WILLNER: Yes.
THE WITNESS: Would teach in instructional media and would have one 500-level course each term, likely, and all 300 to 400 level courses other than that.

Sherry Mihel, of course, would also teach that freshman

> level introduction to the library for new students on an irregular basis just as she had the time.

(Tr. 17,460-462).

While the educational backgrounds of the Mihels may be comparable, and while they may both teach upper division courses, and while George Mihel may have been slightly underqualified for the position for which he applied and to which he was hired, and while Sherry Mihel may have been overqualified for the position for which she applied, and to which she was hired, their disciplines are different. Mr. Mihel is a faculty member in a professional school, the School of Education. Ms. Mihel is a faculty member who is a librarian. Ms. Mihel's claim is basically a comparable worth claim. In her testimony (by

deposition), Ms. Mihel testified as follows:

> Q [By Mr. Willner] Why do you believe that he [George Mihel] was paid more than you were?
>
> A Because he's a man and I'm a woman.
>
> Q And why do you believe that this was the reason that he was paid more than you were?
>
> A The library field is predominantly women. It's -- in statistical abstracts -- it's 81 percent women in the library field. In education, and particularly education in an institute of higher education, it's predominantly men, about 67 percent men. And I believe that the administration was aware that it would be most likely a woman would be hired within the library field, and so they offer a lower salary. There are also not many openings and a lot of people looking for positions in the library field, and those people are predominantly women, and they are willing to take a job if one comes available and at a lower salary because there are so few positions.

(Pl. Ex. 2684, Deposition of Ms. Mihel, June 7, 1983, pp. 20-21).

The vacancy notices for the positions for which Sherry Mihel applied and George Mihel applied were sex-neutral vacancy notices. Either sex could have applied for either job. A contention has been made throughout this trial that the pay of nurses, dental hygienists, and librarians is low in comparison with the salaries of predominantly male-dominated positions such as doctors, dentists, and football coaches. The court has already ruled that those issues are foreclosed in this lawsuit. See Opinion and Orders of August 10, 1984 and September 13, 1984.

Sherry Mihel cannot prevail on her individual claim.

Ms. Mihel Footnotes

1. It is a common practice for institutions to hire faculty in the status of ABD (all but dissertation) at the rank of instructor and then to promote them as soon as the doctoral degree is received.

2. George Mihel became Ms. Mihel's husband in 1980. They did not know each other when they began their employment at SOSC. Ms. Mihel also contends that Randy Hitz and Michael Davey are appropriate comparators. Ms. Mihel testified as follows (by deposition):

> Q [By Mr. Willner] In addition to the comparison with your husband, George Mihel, are there other male faculty members that you compare yourself with in terms of salary or rank?
>
> A That were hired at the same time. There's Randy Hitz in the education department.
>
> Q Let's do one at a time, then.
>
> A All right.
>
> Q What was Randy Hitz's education and background before he was hired?
>
> . . .
>
> A He completed a BS in '71, I

believe. I'm not positive of the dates. And then a masters in I think '75. And those were in education. His major was early childhood education. And he then worked on a doctorate, also.

And when he came to the college, he came with his doctorate completed except for dissertation.

Q The same situation as yours?

A The same situation. And he was hired as assistant professor, and his salary was $14,800.

Q What experience did he have before he came there, do you know?

A I'm not sure. I know he had taught before he came.

Q Do you know his approximate age?

A I think he's a year or two younger than me. He's about the same age, approximately.

. . .

Q Are there other members of the faculty which you compare yourself with in terms of salary or rank?

A There's one in, I believe it's the Physical Education Department, Dave -- that's his last name. Davey.

Q Davey. Do you know his first name?

A I think it's Michael.

Q Do you know what his education was before he came?

A I know he received his bachelors a few years after I did, and his masters, also, after I did. I don't know if he's doing work on a doctorate.

Q Do you know what experience he had?

A No.

Q Do you know his approximate age?

A Approximately the same age.

Q The same age as you?

A As me.

Q Was he hired the same time as you?

A Yes, he was, fall of '78.

Q What was his rank?

A Assistant professor.

Q And what department did you say?

A P.E. And he taught -- he coached, but he also taught education PE courses, and I believe they had education majors.

(Pl. Ex. 2684, Deposition of Ms.Mihel, June 7, 1983, pp. 23-26).

This is the only evidence presented by Ms. Mihel regarding these two comparators. It is insufficient to allow a comparison between Ms. Mihel and these two men. Furthermore, she presented no documentary evidence to support this testimony. The court declines to discuss further these two men as comparators for Ms. Mihel.

OREGON INSTITUTE OF TECHNOLOGY

KLAMATH FALLS, OREGON

Lorraine B. Furby

Margaret Huntley

LORRAINE B. FURBY

Lorraine B. Furby, an assistant professor in the Department of Nursing in the Division of Health Technologies at the Oregon Institute of Technology (OIT), claims that she was discriminated against because of her sex in that (1) she was paid less than her male predecessor for performing substantially the same job; (2) she is paid less than equally qualified men who were performing substantially the same job as she performs; and (3) she was denied promotion to the rank of associate professor while men with substantially equal qualifications, experiences, and positions were promoted to the rank of associate professor. Ms. Furby intervened in this action as a named plaintiff without filing a claim of sex

discrimination with the Equal Employment Opportunity Commission.

Ms. Furby came to OIT in 1961 on a one-year contract as an instructor. She was hired to start a two-year dental assisting program that would meet the standards for accreditation set by the Council of American Dental Assistants Association. At that time Ms. Furby was a Certified Dental Assistant and a Dental X-ray Technician, but she had no Bachelors degree. Prior to her appointment at OIT, Ms. Furby had worked in a private dental office as a dental assistant and dental laboratory technician (five years); as an X-ray technician at the University of Oregon Dental School (two years); and as an instructor at the University of Oregon Dental School (one year).

Ms. Furby's contract at OIT was

renewed in 1962 and again in 1963 and 1964, when she was promoted to the rank of Instructor II. In 1965, she received indefinite tenure and was promoted to the rank of Senior Instructor.

In 1971, Ms. Furby received a B.S. degree in health education from Oregon State University and she was promoted to the rank of assistant professor. She continued with her work in the Dental Department. In 1978, Ms. Furby received an M.Ed. degree in education with a health major from Oregon State University. Shortly thereafter she transferred from the Dental Department to the Biological Sciences Department in order to teach personal health, cardiopulmonary resuscitation (CPR), and first aid. She still teaches these three courses although she became a member of the Department of Nursing in

the Division of Health Technologies in 1982.

In 1969, Ms. Furby prepared materials for an accredited correspondence course for dental assistant certification through the American Dental Association. Those materials, which she revised in 1972, covered coursework for Introduction to Dental Assisting, Dental Anatomy, Oral Surgery and Endodontics, Oral Radiology, Dental Nutrition, Office Management, and Dental Health Education. Ms. Furby is a member of several professional societies including the National Association for Advancement in Health, the Oregon Health Education Committee, Southern Oregon and Northern California Emergency Medical Association, and the Oregon Heart Association. She has participated extensively in local activities such as

the Emergency Response Team on the OIT campus, the Klamath County CPR Drive, and the Klamath County Mental Health Developmental Disability Commission.

SALARY CLAIM

Ms. Furby claims that she was discriminated against because of her sex in that she was paid less than her male predecessor, Tillman Ogdahl, and is paid less than male faculty with similar job qualifications and experiences. The Board concedes that Ms. Furby has not progressed rapidly in salary but claims that the explanation is not sex related. The Board claims there are four reasons for Ms. Furby's relatively low salary: (1) she received her B.S. and M.Ed. degrees relatively late in her employment at OIT; (2) her performance has been below average; (3) her fields of dental assisting and health education

do not command as high a salary in the marketplace as other fields at OIT; and (4) she has not been promoted to associate professor and therefore has not received a promotion raise since 1971.

In support of her salary claim, Ms. Furby offers five comparators: Tillman Ogdahl, Gene Culver, Richard Strohkirch, Sherman Anderson, and John Bradley. Of these comparators, only Mr. Ogdahl has taught in her department. In support of her claim that she replaced Mr. Ogdahl at a substantially lower salary, Ms. Furby offered this statement in her direct testimony, which was presented by affidavit. "For the years 1977 through 1979, Mr. Ogdahl averaged $3,676 per year more than I did." Pl. Ex. 2694 p. 5. She also testified (by affidavit) that she had more years of service or a

higher academic degree than each of her comparators. However, Ms. Furby did not testify as to the number of years of service or highest academic degree of Mr. Ogdahl.

Ms. Furby's evidence regarding Mr. Ogdahl is totally inadequate to support any finding that Mr. Ogdahl is an appropriate comparator for Ms. Furby. There is no testimony from Ms. Furby that she replaced Mr. Ogdahl or that Mr. Ogdahl per formed the same job as she performed.[1] Ms. Furby has the burden of presenting a prima facie showing of discrimination. She has failed to present even the minimal facts necessary for a prima facie case with regard to Mr. Ogdahl.

Ms. Furby next claims that she was paid less than Gene Culver, Richard Strohkirch, Sherman Anderson, and John

Bradley for the years 1977 to 1983.[2] The evidence shows that Ms. Furby's salary was lower than these men throughout this period of time. See Pl. Ex. 412.

In order to make a prima facie case of sex discrimination based upon a comparison of work performed, Ms. Furby has the burden of proving that the actual job content of the positions held by her and her comparators is substantially equal and not merely similar. Spaulding v. University of Washington, 740 F.2d 686, 700 (9th Cir. 1984). Ms. Furby asserts in her affidavit that she chose these men as comparators because their duties are or were similar to hers, and that she has either more years of service or a higher degree than each of them. In her cross examination, she testified as follows:

> Q [By Mr. Lidz] Am I right that here you did not -- you compared them [her male comparators] in terms of years of service and academic degree but you did not attempt to make any comparison of the quality of your performance as faculty members?
>
> A Well, I compared them because we were all teachers and most of us teach didactic and lab courses so to me a teacher is a teacher, you have to do your preparation, you have to do your objectives for each class, you have to teach the class, teach the labs and then of course evaluations on the students' testing.

(Tr. 8,547).

The Board contends that Ms. Furby's comparators do not perform work that is substantially equal to hers, and that in any case, legitimate factors relating to quality of performance, discipline, prior experience, and education account for the salary differences.

In order to determine whether the job of Ms. Furby and the jobs of her

comparators are substantially equal under Title VII, the court must make a case-by-case analysis based upon actual job content.

GENE CULVER

Mr. Culver joined the OIT faculty in 1960, one year before Ms. Furby. He has been a full-time research associate in the Geothermal-Heat Center for the past six years. He reports to the Dean of Administration, unlike teaching faculty, who report only indirectly to the Dean of Academic Affairs. Before he joined the Geothermal-Heat Center, Mr. Culver taught for 17 years in the Department of Mechanical Engineering Technology. He also served as department head for several years. At the Geothermal-Heat Center, Mr. Culver is engaged in full-time research supported by grant funds. He publishes a

great deal and does a significant amount of consulting work on geothermal energy matters with the private and public sector.

The court concludes based upon the differences in disciplines, funding sources, responsibilities, and qualifications, that Mr. Culver's position is not substantially equal to Ms. Furby's position and therefore Mr. Culver is not an appropriate comparator for Ms. Furby.

RICHARD STROHKIRCH

Mr. Strohkirch is a regular teaching faculty member of the Department of Medical Radiology Technology. Mr. Strohkirch joined the OIT faculty in 1972, eleven years after Ms. Furby. His initial rank was as an instructor. He was promoted to an assistant professor in 1976. Before joining the faculty at OIT, Mr. Strohkirch had been the chief

radiology technician at a hospital for four years and a staff radiologist at another hospital. His performance at OIT has been very good and he is the current head of his department. Mr. Strohkirch was promoted to associate professor in the spring of 1984. The courses he teaches are taught at a higher level than the courses Ms. Furby teaches.

Dr. William Smith, the Dean of Academic Affairs at OIT, was asked to compare the difficulty and the skills required to teach courses in the Department of Medical Radiology Technology with the courses in health education. Dr. Smith testified as follows:

> Q [By Mr. Lidz] How do you -- -can you compare the difficulty and the skills required to teach courses in medical radiology technology and -- on the one hand and health education on the other?

A Well, they're, of course, two entirely different disciplines with some similarity. However, the program in medical radiologic technology is a three-year program at OIT. I would have to characterize it by saying that the -- that the discipline is more challenging in general than health education. It's taught at a higher level.

The health education courses are predominantly at the freshman level. These go into junior level courses. The discipline is, in a sense, more specialized but also a very rapidly emerging and developing evolutionary discipline. In general, I would say it would be more intellectually challenging.

THE COURT: Is health education primarily a course that most people take? I mean, is it something that is a basic course that if you are a college graduate, you ought to have?

THE WITNESS: Yes, ma'am. There is a requirement in the Oregon State System of Higher Education that all of the Baccalaureate degree students will have had health education and physical education, yes.

THE COURT: Is there a difference between health education and the science program that you were just talking about, the X-ray and CAT scans and so forth?

THE WITNESS: Yes. This is a -- that's correct. The health education program is a requirement for all of the students before they earn their Baccalaureate degree. Medical radiologic technology is strictly a major degree. It's not a service course.

Q (By Mr. Lidz) Can you just clarify what you mean by a service course?

A A service course is one which is available to all students; and generally a service course is one in which there is not a major in the discipline, although that's not always true, but usually is.

Q Is there any major in health education at OIT?

A No.

(Tr. 20,234-235).

Positions that are deemed substantially equal for the purposes of pay require the same or substantially

equal levels of skill, effort, and responsibility. The court finds that Dr. Smith's testimony is credible and that Ms. Furby's position is not substantially equal to the position of Dr. Strohkirch. Dr. Strohkirch's position requires different skills, experience, and effort.

SHERMAN ANDERSON

Sherman Anderson joined the OIT faculty in 1969 as an assistant professor in the Department of Electrical Engineering Technology. He was promoted to the rank of associate professor in 1975. Mr. Anderson has a Bachelors degree and a Masters degree in electrical engineering. He received his Masters degree in 1954, 24 years before Ms. Furby received her M.Ed. degree. Mr. Anderson teaches predominantly upper division courses in electronics. Dr.

Smith testified that Mr. Anderson received a higher salary than Ms. Furby based upon the fact that he has received greater merit increases than Ms. Furby because he is a better performer than Ms. Furby; the discipline of electronics commands higher pay in the marketplace than the discipline of health education; and Mr. Anderson came to OIT with extensive experience in the electronics industry, which pays considerably higher salaries than salaries for dental assistants. Ms. Furby does not challenge Dr. Smith's testimony.

The court has recognized throughout this case that market considerations and performance are legitimate considerations in salary decisions. The court finds that Mr. Anderson is not an appropriate salary comparator for Ms. Furby.

JOHN BRADLEY

Mr. Bradley joined the faculty at OIT in 1978 as an assistant professor in the Department of Diesel Power Technology. He was promoted to associate professor and named department chair in 1981. Mr. Bradley received a Bachelors degree in industrial arts in 1966 and a Masters degree in power mechanics in 1971, both from San Diego State College. He received his Masters degree seven years before Ms. Furby received her M.Ed. degree. He had taught in a public high school for ten years and had been an instructor at San Diego State College for one year prior to coming to OIT. He had also had practical experience in the field of diesel power technology, but Ms. Furby had also had practical experience in the field of dental assisting. Dr. Smith testified that Mr.

Bradley is not an appropriate salary comparator for Ms. Furby because he teaches an entirely different discipline at the upper division level and is a department head. In addition, Dr. Smith testified that Mr. Bradley is a superb performer and that Ms. Furby is not.

Regardless of whether the differences in performance adequately account for the salary differences between Ms. Furby and Mr. Bradley, the court finds that Mr. Bradley is not an appropriate comparator for Ms. Furby.

Ms. Furby has offered no evidence of actual job content for her asserted comparators. The only evidence before the court as to job content was presented by the Board. The Board, not surprisingly, highlighted the differences in skill, effort, and responsibility between Ms. Furby's

position and that of her comparators. Salary differences alone are not adequate to support any inference of sex discrimination in the context of this case. Ms. Furby has the burden of showing that the actual job content of the positions is substantially equal, and she has not carried that burden.

The only evidence which may be deemed direct evidence of discrimination is a statement allegedly made in 1974 to Ms. Furby by a Dr. Wilson, her supervisor at that time. The statement was that Ms. Furby did not need a raise because her son was "out of the nest." Pl. Ex. 2694 p.4. Ms. Furby's son was attending college away from home. This statement is insufficient to prove sex discrimination.

Finally, Ms. Furby suggests that the system for merit increases at OIT has

resulted in discrimination. Ms. Furby claims that the "plus system" contains much subjectivity and that the administration has not been able to satisfactorily explain to teachers how the "pluses" necessary for merit increases are earned. (See Pl. Finding of Fact No.9). The only evidence presented by Ms. Furby in her case in chief was her affidavit and accompanying exhibits. There is no reference to the system for merit raises anywhere in this evidence and no rebuttal evidence was presented.[3]

Ms. Furby cannot prevail on her individual claim of salary discrimination.

PROMOTION CLAIM

Ms. Furby has applied for promotion to the rank of associate professor yearly since 1973 and has not been promoted.

She contends that she has not been promoted because of her sex, while men with comparable qualifications and experiences have been promoted. In support of her promotion claim, Ms. Furby relies upon the same five comparators as she did for her salary claim: Tillman Ogdahl, Gene Culver, Richard Strohkirch, Sherman Anderson, and John Bradley. Ms. Furby claims that despite the fact that their duties are (or were) similar to her duties, and despite the fact that she has either more years of service or a higher academic degree, each of these men has been promoted to the rank of associate professor.

The Board admits that Ms. Furby has not been promoted since 1971, when she became an assistant professor, but argues that the reason is not gender based. The Board claims that Ms. Furby has not been

promoted because of her lower-than-average performance, the undemanding nature of her job, and the receipt of academic degrees relatively late in her career. The Board argues that the promotion process at OIT is a competitive one and that Ms. Furby has simply been outperformed by other faculty members.

There are a limited number of promotions awarded annually at OIT because salary increases for these promotions come out of the general institutional budget, which is a limited budget. Roughly 8-10% of faculty are promoted each year, although a higher percentage are eligible by virtue of being minimally qualified. As a result, promotions are based upon a performance evaluation which goes beyond minimum performance required for promotion. According to Dr. Smith, the Dean of

Academic Affairs, promotions are competitive, and people with minimum qualifications tend not to be promoted. In 1980, for example, OIT required department heads to review for promotion all eligible faculty members. After this was done, the department heads then met with the associate deans (now called division chairpersons) to prioritize candidates for promotion by rank. The associate deans then met with the Dean of Academic Affairs where the list was again pared. Then the Rank Promotion Committee, a large committee composed of the Dean of Academic Affairs, five associate deans, five faculty members appointed by the faculty senate, and the student body president, reviewed the list and submitted a final prioritized list of promotion recommendations to the president. The president made the final

decisions on promotions.

In 1982, OIT deleted the requirement that all eligible faculty had to be considered. The committees which included the dean and associate deans were eliminated and the Rank Promotion Committee was replaced by a smaller Promotion Advisory Committee. Whatever the system, the process at OIT is a prioritized system in which faculty who are not recommended for further consideration at any given level will no longer be considered at the next level.

Ms. Furby presented no evidence in this case that the process as described affects women differently than men, or that women were discriminatorily not considered for promotion. Ms. Furby was, in fact, considered each year for promotion. Therefore, any discriminatory denials of promotion made before July 21,

1979, are time-barred. (See infra Law Applicable to Named Plaintiffs' Claims p. 5). However, discriminatory denials of promotion which may have occurred prior to July 21, 1979, will be considered by the court as it makes its ruling concerning discriminatory acts within the relevant time period.

Ms. Furby testified upon cross examination that a unanimous vote was necessary at each step of the process in order for a candidate for promotion to be considered further. She explained that in 1979, Dr. Don Karr, who was her department chair, was the only one who voted "Nay" in her case, thereby precluding her from any further consideration for promotion. She testified as follows:

> A I talked to Dr. Don Karr about this, who was my department chairperson at that

time, and I asked him why he voted nay, and I'm going to quote Dr. Karr by stating, "Well, you know, Furby, that's the way the political waves go."

Q [By Mr. Lidz] And is it again your belief that everybody else here was in favor of your promotion except Dr. Karr, who was opposed to it?
A Yes. That's the way it was explained to me.

Q And Dr. Karr in that year was your department chair; is that correct?

A Yes. He said he just had to vote that way because there were four males -- three males running besides myself and they just had to be promoted over and above me.

Q Well, do you know who these other four people were who were listed as confidential?

A I'm not real sure.

(Tr. 8,569-570). As proof that Don Karr thwarted her opportunity to be promoted in 1979, Ms. Furby submitted exhibit 456, which follows this page.

Dr. Karr testified, however, that his "Nay" vote on the 1979 promotion recommendation reflects his disagreement with the committee's decision to recommend four other individuals for pro motion rather than Ms. Furby. Dr. Karr stated that he does not recall ever having said, "That's the way the political waves go," and denied saying that he "just had to vote that way" because there were three males aside from Ms. Furby who "just had to be promoted over and above" her. See Def. Ex. 8133; affidavit of Don J.Karr.

A plain reading of exhibit 456 shows that Dr. Karr voted against the recommendation, which was not to consider Ms. Furby further for promotion. Dr. Karr's "Nay" vote is a vote in favor of Ms. Furby, while three women and two men voted against her - that is, not to

recommend her for promotion. Dr. Karr's "Nay" vote is no evidence of sex discrimination against Ms. Furby and casts serious doubt upon her assertion that Dr. Karr made any statement that he voted for a man over her.

BEST

Date: June 30, 1980

To: All Staff in the Office of the Vice President for Finance and Administration

From: James T. McGill JTMc

Subject: Organizational Changes

UCHSC
Health Sciences Center
Portland

Effective July 1, 1980, the following reporting lines are established:

Vice President for Finance & Administration	James T. McGill
Assistant Vice President, Budget & Finance	James T. McGill (Acting)
Budget Office	Richard A. Stolz (Acting)
Research Services	Abdul O. Anani
Accounting	Bruce W. Palmer
Assistant Vice President, Facilities Management	Ralph E. Tuomi
Physical Plant	Ralph E. Tuomi
Facilities Planning	Gordon H. Ranta
Security	Richard C. Anderson (Acting)
Parking	Warren E. Davis
Instrument and Safety Service	George I. Johnston
Assistant Vice President, ~~Fiscal~~ Business Management	M. R. Parelius (Acting)
Auxiliary Services	Ann L. Hoffstetter
Purchasing	Shirley J. Carey
Payroll	Irene Fulmer
Business Office	Cecil B. Burt
Accounts Payable	Phyllis Seid
Animal Care	Allan L. Rogers
Inventory and Surplus	G. Marvin Stephens
Student Activities Building	Benjamin R. Jensen
Assistant Vice President, Information Systems	M. R. Parelius (Acting)
Systems Development	TBA
Technical Support	George I. Johnston (Acting)
Assistant Vice President, Management Services	M. R. Parelius
Affirmative Action	William W. Jackson
Internal Audit	Hilton A. Talbert
Personnel	Bill R. Kribs
Contracts	Howard J. Dahlstrom
Special Projects	Monte R. Mullen

Circle added by the court

Please note that this display represents the reporting relationships of existing units. The organizational structure will be under continued review and is subject to change in the future.

JTM:mjh

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Page 336 - OPINION

DEFENDANT'S EXHIBIT 4509

AVAILABLE COPY

The Board asserts that Ms. Furby has not been promoted over other faculty members because the subject matter she teaches is not competitive and her performance has been substandard. Ms. Furby teaches CPR and first aid, mostly at night and on week-ends. Ms. Furby and Wendy Gammons both teach personal health which is a required lower division course. Dr. Smith, Dean of Academic Affairs, testified as to Ms. Furby's teaching performance, professional development, and service to the institution:

> Q [By Mr. Lidz] Can you evaluate Miss Furby's teaching performance generally? That is, in personal health, first aid and CPR? And if you need to, break it down among the three courses?
>
> A She does very badly in the course on personal health, as indicated by student evaluations. In the areas of first aid and CPR, her student

evaluations are a little bit better. But overall, I would have to classify Mrs.Furby as one of our substandard instructors.

Q How does Wendy Gammins do with the personal health course in terms of student evaluations?

A Very well.

Q Have you personally received any feedback concerning Miss Furby's teaching?

A Yes, a considerable amount.

Q Can you -- without going into detail, can you characterize it?

A I don't think that a term goes by that I do not have one or more students in my office to complain about Mrs.Furby's instruction.

Q How do you evaluate Miss Furby in terms of her professional development?

A She does very well in professional development in the areas of first aid and CPR. Beyond that, she doesn't do a great deal. She does maintain licensure and does attend workshops and conferences in those areas.

Q How do you evaluate her in terms of service to the community?
A Again, in those two areas of her interest, she does very well. She makes a number of contributions.

Q And how about service to the institution?

A Service to the institution, unfortunately, has been very limited.

Q Do you have an opinion as to why that is?

A Part of it is her health.

A second factor has been a rather unusual teaching schedule. Mrs. Furby is not to be found on campus during the day a great deal of the time, partly because her -- many of her first aid or CPR courses are taught during the evenings or occasionally on Saturdays.

I think a third factor, up until recently, has been her lack of interest in serving on committees or com missions. I believe two years ago she, for the time that I can recall, did request an assignment to a committee.

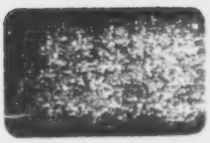
(Tr. - 20,212-13).

In support of her sex discrimination in promotion claim. Ms. Furby offered into evidence Pl. Ex. 445, 456 and 446 which follow this page. These are various recommendations for promotion. Ms. Furby's promotion claim is difficult to evaluate because there is no evidence as to who was promoted in the years that Ms. Furby was not promoted. Since OIT limits the number of promotions each year for fiscal reasons, a faculty member may be well qualified for promotion any given year and yet not be promoted because others are more qualified or perform at a higher level.

BEST AV

Table 2 a

OREGON INSTITUTE OF TECHNOLOGY
KLAMATH FALLS, OREGON 97601
TELEPHONE 503/ 882-6321



May 20, 1982

EXHIBIT 12-B

Ms. Catherine Furi
Associate Dean
Allied Health Division
Oregon Institute of Technology
Klamath Falls, OR 97601

Dear Catherine:

It is a pleasure to write on behalf of Lorraine Furby in support of her promotion to Associate Professor. Lorraine is highly dedicated to the teaching of CPR and First Aid and constantly attending conferences in order to maintain her numerous certifications. In addition, Lorraine's contribution in the community sector has been prodigious--just one example is the hundreds of Klamath residents whom she has taught CPR as a part of a county-wide drive.

It should be mentioned that while Lorraine's student evaluations are not exemplary, there are some extenuations--CPR and First Aid are Lorraine's forté, yet it is not possible to have them evaluated as they are offered on Saturdays and evenings. Thus, her only evaluations are in the large, and sometimes even hostile, Personal Health sections where it is extremely difficult to obtain a reasonable evaluation.

In addition to her dedication as an instructor, Lorraine's professional development is voluminous: she is currently doing research in Industrial Safety, and her expertise in that area has resulted in her being invited to present a paper at the University of Utah--quite an honor indeed.

Summarily, one has to note that Lorraine has been an Assistant Professor for ten years. She is deserving of the promotion and I hope and urge that it finally be awarded to her.

Sincerely,

David G. Korzan, Ph.D.
Department Chairman
Biological Sciences and Chemistry

bjy

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Table 2 b

OREGON INSTITUTE OF TECHNOLOGY
KLAMATH FALLS, OREGON 97601
TELEPHONE (503) 882-6321

February 18, 1981

EXHIBIT 12-M

Ms. Catherine Puri
Associate Dean
Division of Allied Health
Oregon Institute of Technology

Dear Catherine:

REGARDING: RANK PROMOTION, LORRAINE FURBY

I would herein like to recommend Lorraine for promotion to the rank of Associate Professor. She is an interesting addition to our group, adding unique balance to our department. It would be difficult to imagine a more dedicated individual when it comes to teaching Health/First Aid courses, and this year her enthusiasm has resulted in somewhat improved student evaluations, which are always difficult in the large Personal Health sections. In addition, Lorraine's professional development, of late, has been prodigious with her attendance of numerous conferences and workshops. Finally, she has made a significant contribution to the OIT and local communities both, with her extensive participation in the Emergency Response Team on campus, as well as with the county CPR drive.

Sincerely,

David G. Korzan, Ph.D., Chairman
Biological Sciences and Chemistry

sah

EXHIBIT 12-C p. 3

Professional Development:

Attended National Association for EMT, 1981
Updated the following cards to current 1982 status: First Aid, Oregon Heart and Red Cross, Multi-Media, EMT certification
Emergency Medical Meeting, Agate Beach, May 7-9, 1982
Special day class, Death and Dying, 1982

I will be starting classes in the Nursing Department as I ultimately want to become an RN, so that I can obtain summer employment since there doesn't seem to be much in summer school teaching.

Department Chairperson's General Descriptive Comments:

Remarks by Dave Korzan (quote):

Lorraine does a commendable job with her First Aid and CPR courses and makes a viable contribution to the community in these areas.

Remarks by C. Puri (quote):

Obviously takes great pride in keeping up to date in the state-of-the-art in her courses.

Remarks by W. Smith (quote):

I concur!

Associate Dean's General Descriptive Comments:

I would like to recommend Lorraine Furby for promotion to Associate Professor. Lorraine has been most cooperative and flexible in helping to meet changing needs in health related education at Oregon Tech. For many years she made a considerable contribution to the Dental Assistant program. After completion of a Master's degree in Health Education Lorraine moved into the area of Health Education, C.P.R., First Aid, and E.M.T. training, and has apparently found her niche! As Dr. Korzan points out, she is indefatigable in pursuit of all the many certificates necessary to keep current in the latter three areas. Her contribution to this division is truly appreciated.

Catherine M. Puri
Associate Dean
Division of Allied Health

BEST AVAILABLE COPY

There is no evidence in this case that the process of limiting promotions is related in any way to sex or falls differently upon women. On the contrary, the Board presented evidence that male faculty members have remained in the rank of assistant professor for long periods of time. For example, John Anderson was an assistant professor in 1966 and remains an assistant professor to the present; Dale King, an assistant professor from 1966-1984; Neil Garrett, an assistant professor from 1970 to the present; Richard Rath, an assistant professor from 1973 to the present. Ms. Furby does not contradict or otherwise challenge the Board's claim that men also remain in the rank of assistant professor for long periods of time at OIT.

Ms. Furby claims that her five comparators were promoted to associate professor while she remained an assistant professor. Mr. Ogdahl was never promoted to associate professor. As to the other four, Mr. Strohkirch was promoted to associate professor in 1984; Mr. Anderson was promoted to associate professor in 1975; Mr. Bradley was promoted to associate professor in 1981, and Mr. Culver was appointed to associate professor in 1960. Each of these faculty members is employed in a different discipline than Ms. Furby -- medical radiology, electrical engineering technology, or diesel power technology. The court has no facts regarding the promotions of these men. Ms. Furby has the burden of proving her case.

The court is satisfied that Ms. Furby's failure to achieve the rank of

associate professor is because she is an average performer, and her contributions to the OIT campus and to teaching have not proved competitive.

Ms. Furby cannot prevail on her individual promotion claim.

Ms. Furby Footnotes

1. The Board presented the following evidence regarding Mr. Ogdahl: He taught health education and was assistant foot ball coach at OIT from 1974 through the fall of 1979. He completed his Masters degree in 1948, 30 years before Ms. Furby, and had completed all the coursework toward his doctorate. He came to OIT with 20 years' teaching and coaching experience at Willamette University where he last held the rank of associate professor. He was initially hired at OIT as an assistant professor.

2. Ms. Furby's Proposed Findings of Fact Nos. 5 and 7 assert allegations of salary differences between Ms. Furby and two additional male faculty at OIT, William Johnson and Charles Selleck. The court has found no evidence concerning either of these individuals in Ms. Furby's case in chief. The court is not at liberty to make findings for which a plaintiff has presented no evidence.

3. The Board offered evidence that merit increases are directly correlated to a faculty member's annual performance evaluation on the Faculty Annual Merit Evaluation (FAME) or Annual Performance Evaluation (APE) forms. On these forms faculty members receive numerical scores on their performances in each of their areas of responsibility. The scores are added, and a certain number of pluses are awarded according to the total points received on the FAME or APE form. (See Def. Ex.8034, pp.57-60, 68-69). When the merit increases are awarded, a dollar

value is assigned to each of the pluses. The dollar value of each "plus" is determined on a department-by-department basis, so that department heads cannot increase the share of merit money to be allocated to their departments simply by giving everyone in their departments maximum scores. Ms. Furby has not identified any manner in which this method of determining merit increases has discriminated against her because of her sex or any other factor that is not a legitimate basis for salary determination.

MARGARET HUNTLEY

Margaret Huntley, an associate professor in office systems technology [formerly secretarial science technology] in the Division of Business Technology at the Oregon Institute of Technology (OIT), claims that she was discriminated against because of her sex in that (1) she has received a lower salary than equally qualified men who perform substantially the same job as she performs and (2) she was not promoted to associate professor until 1983, while men, who were equally qualified were promoted to associate professor in 1981 and 1982.

Ms. Huntley received a B.S. degree in business from Oregon State University in 1971 and an M.B.E. degree in business education from North Texas State

University in 1974. Prior to coming to OIT in 1975, Ms.Huntley had been a high school teacher (3 years), a legal secretary (2+ years), and a secretary in an insurance company and at Oregon State University (2+ years).

Ms. Huntley became employed at OIT in January, 1975, on a half-time basis as an instructor to help develop courses in legal and secretarial "options", which were to be offered in the fall of 1975. (Tr.7,566). She also taught "refresher" shorthand and some night courses. In the fall of 1975 she became employed full time at the rank of instructor. In 1977, Ms. Huntley was promoted to assistant professor and then to associate professor in 1983. She was placed on a tenure track position in 1982.

Since coming to OIT, Ms. Huntley has taught typing, shorthand, legal office procedures, medical typing and transcription, and applied office practice. She has served on the Faculty Senate, on Women's Day committees, the College Discipline Commission, and numerous search committees and faculty welfare committees. She has assisted with Parents Weekend, Career Day, the speech contest, and the annual business skills contest. She is presently an adviser to the medical secretarial students.

John Smith, Dean of Administration at OIT, testified to Ms. Huntley's performance as follows:

> Q [By Mr. Lidz] And in general terms how would you rate her performance as a faculty member?
>
> A I think she's a very good faculty member.

(Tr. 18,724). Dr. Smith also testified that Ms. Huntley had been a willing and effective contributor to her division and had done her share of community service. Ms. Huntley is not, however, current in computer applications and would not meet the criteria for recent openings in the area of office systems technology.

PROMOTION CLAIM

In 1980, 1981, and 1982, Ms. Huntley was recommended for promotion to the rank of associate professor by her department and the Dean's Committee or Promotion Advisory Committee. However, she was not promoted by the college president until 1983. Ms. Huntley claims she was not promoted in 1981 and 1982 because of sex discrimination.

In 1980 and 1981, OIT required department heads to consider all

eligible faculty for promotion. Department heads would then meet with their associate deans (now called division chairpersons) to prioritize candidates for promotion to each of the various ranks. The associate deans would then meet with the Dean of Academic Affairs and narrowed the list of names forwarded to the Rank Promotion Committee for further consideration. The Rank Promotion Committee was a large committee composed of the Dean of Academic Affairs, the five associate deans, five faculty members appointed by the faculty senate, and the student body president. The Rank Promotion Committee then submitted a prioritized list of promotion recommendations to the president. At OIT, the number of promotions that can be made in any year

is limited. Not all eligible faculty can expect to be promoted.

In 1982, OIT made three changes in the promotion procedure: (1) it deleted the requirement that all eligible faculty had to be considered for promotion; (2) it eliminated the Dean and Associate Dean's Committee; and (3) it replaced the Rank Promotion Committee with a smaller, less cumbersome committee called a Promotion Advisory Committee.

Ms. Huntley became eligible for promotion to the rank of associate professor in 1980. She was one of 28 faculty reviewed by the Dean and Associate Dean's Committee. She was not one of the eleven persons selected for further consideration by the Rank Promotion Committee. Ms. Huntley does not claim sex discrimination with regard to the 1980 denial of promotion.

In 1981 Ms. Huntley was again eligible for promotion to the rank of associate professor. That year the Dean and Associate Deans' Committee considered 25 faculty with the rank of assistant professor for promotion to associate professor. The Rank Promotion Committee recommended to the president that eight faculty members be promoted from assistant professor to associate professor. One of the faculty members recommended was Ms. Huntley. However, the Rank Promotion Committee prioritized the names and Ms. Huntley ranked number seven. The President of OIT promoted five of the faculty members whose names were submitted to him by the Rank Promotion Committee. Ms. Huntley was not one of those promoted.

In 1982, after the promotion procedure was streamlined, the Promotion

Advisory Committee recommended seven people to the president for promotion to associate professor. The list of people recommended was not prioritized. Four of the seven were promoted: Charles Harris, Jerald Norman, Eric Peterson, and Edward Selling. Three were not promoted: Ms. Huntley, Richard Strohkirch, and Richard Zbinden. However, Ms. Huntley, Mr. Strohkirch, and Mr. Zbinden each received a $500 increase in their salary along with notifications that they would not receive promotions.

Ms. Huntley claims that the president did not grant her promotions in 1981 and 1982 because of her sex. The Board claims that the promotion decisions were based upon the candidates' year of hire, year of highest degree, highest degree, length of time spent in the rank of assistant professor, and

prior service before coming to OIT as well as more subjective factors such as quality of teaching and service to the institution and the community.

Ms. Huntley's comparators for her sex discrimination in promotion claim are Charles Harris, who was promoted to the rank of associate professor in 1982, and Thomas Bradley and Robert Mitchell, who were promoted to the rank of associate professor in 1981. Ms. Huntley does not claim that discrimination was involved in the promotions of Mr. Norman, Dr. Peterson, and Dr. Selling.

Charles Harris

Mr. Harris, like Ms. Huntley, has an M.S. degree. He was hired at OIT in 1976, one year after Ms. Huntley, as an assistant professor. (Ms. Huntley was an instructor until 1977.) Mr. Harris,

then, had one more year in rank, while Ms. Huntley had one more year of service at OIT. Mr. Harris received his M.S. degree in 1969. (Ms. Huntley received her M.B.E. degree in 1974.) Mr. Harris had had approximately 24 years of industrial and teaching experience before coming to OIT. (Ms. Huntley had had approximately eight years of vocational work and teaching experience before coming to OIT.) Mr. Harris is in the Department of Diesel Power Technology.

Thomas Bradley

Mr. Bradley was hired as an Assistant Professor in the Department of Diesel Power Technology in 1978, three years after Ms. Huntley was hired. He received a bachelors degree in 1966 and a masters degree in 1971. When he joined the OIT faculty, he had had two years of

college level teaching experience, 13 years of high school level teaching experience, and approximately seven years of industrial experience. Mr. Bradley is one of the "stars" at OIT. The Dean of Academic Affairs at OIT, Dr.William Smith, testified as follows regarding Mr. Bradley:

> Q [By Mr. Lidz] What distinguishes Mr. Bradley as a faculty member, if anything?
>
> A In his case there are a number of things that are distinguishing. First of all, he's a workaholic. Mechanically he's a genius. He is probably the most knowledgeable person on all of our faculty and that includes the group of very considerably knowledgeable people with respect to equipment operation, maintenance, repair. The man actually can fix anything that I have ever encountered. He serves as our surplus property, federal surplus property coordinator. Therefore, we have capitalized on that experience very well. He screens surplus property for

us and coordinates its being brought to campus.

He's an excellent department head. And he's truly an outstanding instructor.

(Tr. 20,187).

Robert Mitchell

Mr. Mitchell joined the OIT faculty in 1975, the same year as Ms. Huntley, as a mathematics/physics teacher. His appointment, however, was at the rank of assistant professor. He received a bachelors degree in 1966 and a masters degree in 1970. He has completed all of the coursework for his Ph.D. degree. Before he came to OIT he taught at Nashville Technical Institute for several years as an associate professor of physics. He had also been a research assistant at Washington State University and had had extensive industrial experience. As to Mr. Mitchell, Ms.

Huntley testified on cross- examination as follows:

> Q [By Mr. Lidz] And he [Mr. Mitchell] also -- you mentioned that he had been promoted . . . in 1981; is that right?
>
> A Correct.
>
> Q And he is noticeably older; is he not? I don't have his age in front of me, but --
>
> A I -- I guess he is older than I am.
>
> Q Yeah okay. Am I right, also -- do you know that he had experience teaching as -- at the associate professor level in Nashville before he came to OIT?
>
> A I wasn't aware of that until just this last year when I reviewed his file.
>
> Q So you do know he was an associate professor at, I think it's Nashville State Technical Institute for two years?
>
> A Yes.
>
> Q And he had also taught there at the assistant professor level before being an associate professor?

A The information I had was that he spent five years as a research assistant, one year as a teaching assistant, and then had five years at the associate degree level.

Q At the associate professor level?

A Uh-huh. Is that wrong?

Q No, I -- well, my notes said two years and other experience at the assistant professor level. But he had --he started at OIT as an assistant professor?

A Correct.

Q Even though he had been an associate professor somewhere else before?

A That -- yes, that would be correct.

Q Would that seem to you to explain partly -- at least partly why he may have been promoted before you were?

A I think it could.

(Tr. 7,641-642), (emphasis added).

There is no direct evidence of sex discrimination against Ms. Huntley. Two

men as well as Ms. Huntley were denied promotions in 1982. Ms. Huntley received a promotion in 1983 after six years in the rank of assistant professor -- an average length of time. Ms. Huntley admitted on cross examination that there were numerous men who had never been promoted to associate professor --- Eric Wakkuri, Carl Steidley, Harold Godfrey -- to name some of them. Ms. Huntley testified to instances where women were promoted and men were not. There is simply no evidence in the record to support Ms. Huntley's claim that she was discriminated against because of her sex when she failed to receive a promotion in either 1981 or 1982.

SALARY CLAIM[1]

In her proposed Findings of Fact Ms. Huntley asks the court to make the following findings regarding her salary:

8. For comparison, Mr. Naseth (general studies), Mr. Wakkuri (math), Mr. Mitchell (math/physics), and Mr. Steidley (math) all came to OIT in 1975, all have masters degrees, and all had teaching duties similar to Ms. Huntley's. In 1980 Mr. Naseth's salary was $18,360, Mr. Wakkuri's was $17,307, Mr. Mitchell's was $23,041 and Mr. Steidley's was $19,912. Mr. Furlong and Mr. Isensee both taught in the business division with Ms. Huntley. Mr. Furlong came to OIT in 1981 and has an M.A. Mr. Isensee has a B.A. (and is a C.P.A.). Both had similar teaching duties to Ms. Huntley's during the periods in question. In 1980, Mr. Isensee's salary was $24,456. In 1981 Mr. Furlong's salary was $22,000.

. . .

10. Ms. Huntley was discriminated against on the basis of her sex in that she received a lower salary than males of comparable qualifications who were performing substantially the same work she was performing.

Pl. Proposed Findings of Fact 8 and 10.

The court will first address Ms. Huntley's salary claim as it relates to

Donald Isensee and Peter Furlong, because both of these men taught in the Division of Business Technology with Ms. Huntley.

Mr. Isensee is a certified public accountant whose starting salary at OIT in 1978 was $18,000. His last salary in the private practice of accounting was $26,000. Ms. Huntley's starting salary at OIT in 1975 was $10,782. Her last salary as a high school teacher was $9,000, which was the salary that she stated as her expected starting salary on her employment application form. Mr. Isensee has resigned from OIT and is now a comptroller for a large company. His annual salary is somewhere between $30,000 and $40,000. Ms. Huntley's salary is (or was at the time testimony was taken) $22,490. Ms. Huntley's

division chair, Don Gordon Ward, testified as follows:

> . . . I think very few office managers in Klamath Falls would make $22,500 on a twelve month basis, and her [Ms. Huntley's] salary is based on a nine month basis. So there is, I think -- it is substantially higher than you could get for similar professional work in the com munity.

Tr. 18,825-826.

Mr. Furlong is also a certified public accountant. Unlike Mr. Isensee, who has only a bachelor's degree, Mr. Furlong has an M.B.A. He taught at OIT for only two years, the 1980-81 and 1981-82 academic years. He came to OIT with four years experience as a senior bank examiner for the federal government, two years experience as a certified public accountant, and four years of college level teaching experience. Mr. Isensee taught

Principles of Accounting and Introduction to Accounting. Mr. Furlong taught Managerial Accounting, Income Tax, and Principles of Accounting. Ms.Huntley teaches Medical Office Procedures, Legal Office Procedures, Stenography and Medical Typing.

Mr. Isensee and Mr. Furlong are not appropriate salary comparators for Ms.Huntley. Their educational backgrounds, prior experiences, and teaching positions within OIT are different. Whether it is "right" or not, there was evidence presented that the discipline of accounting commands a greater monetary reward than the discipline of secretarial science. OIT competes in the marketplace for people with these skills. To do so OIT must necessarily pay accountants on its

faculty higher salaries than it pays secretaries on its faculty.

The four other men that Ms. Huntley has named as salary comparators - Gary Naseth, Eric Wakkuri, Carl Steidley and Robert Mitchell - were hired in 1975. The chart on the following page gives information regarding Ms.Huntley and these comparators.

Dr.William Smith, the Dean of Academic Affairs at OIT, explained the beginning salary differences between

TABLE 1a

Name	Salary 1975-76 Academic Year	Salary 1980-81 Academic Year Pl. Ex. 501	Highest Degree and Year Obtained	Rank at Hire	Area of Specialization	Prior College Teaching
Huntley	$10,782	$16,939	Masters 1974	Instructor	Office Systems Technology or Secretarial Science Technology	None (3½ yrs. high school)
Naseth	$12,500	$18,360	Masters 1972	Instructor	General Studies	2 yrs. Western Wash. State College

Table 1b

Name	Salary 1975-76 Academic Year	Salary 1980-81 Academic Year Pl. Ex. 501	Highest Degree and Year Obtained	Rank at Hire	Area of Specialization	Prior College Teaching
Wakkuri	$11,700	$17,307	Masters 1974	Instructor	Mathematics	None (6½ yrs. high school
Steidley	$12,906	$19,912	Masters 1973	Asst. Professor	Mathematics	Santa Monica College + high scho
Mitchell	$17,000	$23,041 (Tr. 7594)	Masters 1970 + all coursework completed for Ph.D. degree. Status is ABD (all but dissertation).	Asst. Professor	Math/physics	4 yrs. Nashville State Technical Institute (part of time as associate professor

Ms. Huntley and Mr. Naseth, who teaches general psychology, on the basis that he had received his masters degree two years before Ms. Huntley received her masters degree. Mr. Naseth also had college level teaching experience at Western Washington State College and had been a course administrator in the Psychology Department for two years.

Dr.Smith explained the beginning salary differences between Ms. Huntley and Mr. Wakkuri, who teaches algebra and trigonometry, on the basis that he had had more years teaching high school than Ms. Huntley, and mathematics, Mr. Wakkuri's discipline, commands higher pay than secretarial science, Ms. Huntley's discipline.

As to Mr. Steidley, who taught Abridged Physics and General Physics. Dr.Smith testified as follows:

Q [By Mr. Lidz] Dr. Smith, can you describe Mr. Steidley's OIT experience in terms of what would be significant to you or to OIT in hiring him?

A Almost all of the positions that he had prior to coming to OIT were relevant to our type of institution. He taught at Litton Industries as a senior engineering instructor. He taught at -- taught mathematics at Santa Monica College. He had high school teaching experience. He worked with a firm in Falls Church, Virginia, as an electronic systems engineer. He worked with Philco Corporation as a field engineer. He had some experience with -- as a tab operator with Capitol Radial Engineering Institution in Washington, D.C., so that all of his background related to the type of institution that OIT happens to be.

. . .

Q Do you have an opinion as to why Mr. Steidley would be hired at more than -- $2,000 more than Ms. Huntley in 1975?

A Well, again, because of his experience predominantly. That is degrees earlier, both

teaching and comprehensive industrial experience.

(Tr. 20,204-205).

As to Mr. Mitchell, who teaches Optics, Introduction to Physical Science and General Physics, Dr. Smith testified as follows:

> Q [By Mr. Lidz] Can you explain why there's more than a $6,000 difference between his starting salary and that of Margaret Huntley?
>
> A Well, the difference in his case would have been experience. He had been an associate professor at another college, he had his degrees earlier, he had all but his dissertation completed for the doctorate. He had both industrial experience and a good deal of college teaching experience.

(Tr. 20,207).

There is no direct evidence of sex discrimination against Ms. Huntley. Starting salaries at OIT are set in accordance with a candidate's highest

degree, the amount and the type of experience the candidate brings to the college, the existing salary rate in the department or division, the candidate's previous salary and the candidate's discipline. Using these standards, the court finds that Ms. Huntley's starting salary of $10,782 was an appropriate salary given her skills, her experience, and her previous salary of $9,000 as a high school teacher.

Salary increases at OIT are across-the-board increases and merit increases. In addition, special raises are given on occasion for reasons such as equity, completion of an advanced degree, or some unusually meritorious service. Faculty at OIT receive a five percent increase for each promotion. At the present time, Ms. Huntley's salary exceeds that of Mr. Naseth and Mr. Wakkuri as a result of

merit and promotion increases she received. Mr. Steidley is no longer employed at OIT.

Ms. Huntley's raises have been better than most faculty in her division and better than most of her comparators. Lastly, Ms. Huntley's salary claim is basically a comparable worth claim. She claims that teachers of Secretarial Science - Business Technology should be paid the same salary as teachers of Accounting, Physics, Psychology and Mathematics. There has been no showing that the positions in these disciplines require substantially the same skills, effort, and responsibilities. Without evidence of substantially equal job content, this issue is foreclosed by Spaulding and the court's order of August 10, 1984.

Ms. Huntley Footnotes

1. Since Ms. Huntley does not make any claims about her annual merit evaluations and the salary increases based on those evaluations or the percentages of salary increases that she has received since the time of her hire, Ms. Huntley's salary claim is deemed to be predicated on her starting salary.

PORTLAND STATE UNIVERSITY

PORTLAND, OREGON

Bernice Gilmore

Betty Leonard

Dr. Elaine Spencer

Dr. Barbara Stewart

Michele Wollert

BERNICE GILMORE

Bernice Gilmore, a retired assistant professor of chemistry at Portland State University (PSU), filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) on May 1, 1980. Ms. Gilmore claims that she was discriminated against because of her sex in that she received less pay and less retirement benefits than equally qualified men performing substantially the same job. Ms. Gilmore received a Right to Sue Letter from the EEOC dated August 8, 1980.

SALARY CLAIM

Ms. Gilmore was first employed at PSU (then Portland State College) in September, 1959, the same year she had received a BS degree in general science from PSU. She was employed as an instructor to handle the laboratory

aspects of the chemistry classes. From 1961-1963 she taught a lecture course in chemistry for engineers. In 1963-64 Ms. Gilmore was on educational leave from PSU. She received an M.A. degree in teaching (as opposed to an M.A. degree in chemistry) from Cornell University. In 1965 she returned to PSU and taught a general chemistry course to liberal arts majors, as well as continuing her laboratory work. She was also promoted to assistant professor in 1965. In 1966 she received a legislative monetary award for excellence in teaching. This award was based almost entirely upon student evaluations. Her peers considered her to be an average teacher.

In the mid-1960's, as a part of its preparation for the transition from "college" to "university," several new faculty members with Ph.D. degrees in

chemistry were hired. A new policy was also initiated: all lecture courses in chemistry were to be taught by persons having Ph.D. degrees in chemistry. This new policy was designed to upgrade the quality of education provided to chemistry students. Ms. Gilmore, who has no degree in chemistry, was again assigned to teaching chemistry laboratory classes, where she continued until her retirement in 1982.

Ms. Gilmore claims that in 1961 her supervisor told her that she did not need a merit pay increase because her husband was employed. In 1961 sex discrimination was not unlawful; however, she contends that since most pay increases at PSU are percentage of salary increases, a discriminatory denial of a pay increase to her has a continuing effect on salary into the

years when sex discrimination is unlawful. She also contends that in 1965 one of her male colleagues received a $1000 merit raise and one of the reasons given by her supervisor was that the colleague's wife was pregnant.

As to the merit pay issue, the only evidence Ms. Gilmore presented is as follows:

Q (by Mr. Willner) In 1961 or 1962 did you have a discussion with the then department chair, Dr. Ferguson, concerning your merit pay?

A Yes, I did.

(Objection and discussion - objection overruled)

Q What did Dr.Ferguson say to you when you discussed with him the subject of merit pay?

A That I did not need the money, that my husband was working.

(Tr. 5433-34)

Ms. Gilmore presented no evidence either before or after this testimony to

show that she was entitled to a merit pay increase or that merit pay increases were even given in 1961 or 1962.

The only evidence presented by Ms. Gilmore that a male colleague received a $1000 merit increase in 1965, partially because his wife was pregnant is as follows:

Q (by Mr. Willner) And what did department Chair Ferguson tell you about the merit raise for Mr. Boster?

A Mr. Boster received a thousand dollar merit raise and the first reason that Dr. Ferguson gave me was that his wife was pregnant.

Q All right.

A My response was I didn't have to get my spouse pregnant, I could do that job all by myself.

Q You yourself had raised some children?

A Yes. I had two sons.

(Tr. 5437)

The defendant presented uncontradicted evidence that Mr.

Boster's salary from 1960-1966 was as follows:

1960-61	$5,000
1961-62	5,400
1962-63	6,000
1963-64	6,500
1964-65	6,500
1965-66	7,000

(Def. Ex. 8101). Clearly, during the year claimed by Ms. Gilmore, Mr. Boster never received a $1000 raise for any reason -- merit, promotion, across-the-board, or because his wife was pregnant.

PROMOTION ON RETIREMENT CLAIM

Ms. Gilmore contends that Cecil Sanford and K. Ellsworth Payne, equally qualified males performing substantially the same job as she performed, were given promotions upon retirement, and she was not given a promotion upon retirement because of her sex. Receiving a "courtesy" promotion upon retirement is important because it increases the salary upon which retirement benefits

are calculated. However, promotion upon retirement is not given routinely or ordinarily anywhere in the state system of higher education.

Mr. Sanford was a physics professor, and Mr. Payne was a biology professor. Prior to their retirement Mr. Sanford was an assistant professor and Mr. Payne was an associate professor. Mr. Sanford's duties were primarily in the physics laboratory. Mr. Payne taught courses entitled The History of Sciences and Vocabulary for Scientists, courses he designed himself, and he also had laboratory duties. Both Mr. Sanford and Mr. Payne had bachelor's degrees. Mr. Sanford's request for promotion upon retirement was presented to the Promotion and Tenure Committee of the Physics Department. Mr. Payne's request for promotion upon retirement was presented

to the Promotion and Tenure Committee of the Biology Department. The Physics Department and the Biology Department at PSU have different expectations and requirements for promotion and tenure from each other and from the Chemistry Department. No department plays a role in the promotion decisions of other departments.

Ms. Gilmore's application for promotion upon retirement was submitted by the Chemistry Department Chairman to the Chemistry Department Promotion and Tenure Committee. At the time of Ms. Gilmore's request for promotion upon retirement, the Chemistry Department Promotion and Tenure Guidelines stated that a Ph.D. degree is normally required for promotion. Absent a Ph.D. degree, outstanding abilities must be shown before a faculty member will be

promoted. No faculty member in the Chemistry Department had ever received a "courtesy" promotion upon retirement.

Ms. Gilmore has two complaints. First, she complains Mr. Sanford and Mr. Payne are paid more than she. Second, she complains that these two men received courtesy promotions upon retirement, while she requested one but was refused. Ms. Gilmore bears the burden of showing that these differences in treatment were because of her sex. She has failed to meet that burden. Although Ms. Gilmore's two comparators were laboratory instructors, they were not in the same department. Each department has a separate promotion and tenure committee, and no committee in one department considers promotions in another department. As to her promotion upon retirement claim, it is undenied that

she was not qualified for a regular promotion, due to her lack of a Ph.D. degree in chemistry. Even assuming that Ms. Gilmore was "qualified" for a "courtesy" promotion upon retirement, she has still not made out a prima facie case of sex discrimination, because she has failed to show that the Chemistry Department ever granted a courtesy promotion upon retirement to anyone. That some departments grant "courtesy" promotions to boost a faculty member's base pay for retirement purposes and some departments do not may be a poor employment practice, but there is no showing in this case that sex discrimination was involved.

Furthermore, the court does not find that Ms. Gilmore is equally qualified with Mr. Sanford and Mr. Payne. Mr. Sanford and Mr. Payne both had masters

degrees in their respective fields; both had more experience in academia and at PSU; both taught more lecture (as opposed to laboratory) classes than did Ms. Gilmore, and both were considered excellent teachers by their peers. In addition, Mr. Sanford had a limited record of publication, unlike Ms. Gilmore.

The court finds that the differences in education and experience between Ms. Gilmore and her comparators is a reasonable, non-pretextual basis for Ms. Gilmore's lower salary.

Ms. Gilmore cannot prevail on her individual claim.

BETTY LEONARD

Betty Leonard, an associate professor in the School of Social Work at Portland State University (PSU), who resigned June 30, 1982, filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) on September 4, 1980. Ms. Leonard claims that she was discriminated against because of her sex in that she received less pay than equally qualified males performing substantially the same job. Ms. Leonard received a Right to Sue Letter from the EEOC on November 5, 1980.

SALARY CLAIM

Ms. Leonard has a B.A. degree from Bennington College, Vermont, and an M.A. degree in Social Work from the Minnesota School of Social Work. She worked for 15 years as a social worker, including 12

years as a social worker with the Portland Public Schools, before being hired by PSU in 1968. From 1968 until 1970 she coordinated a state-wide social services training program funded by the Department of Health, Education and Welfare (HEW) of the federal government. She reported to the Division of Continuing Education and to the PSU School of Social Work.

In 1970, the HEW grant ended and for the next ten years (except for one sabbatical leave in 1979) Ms. Leonard was the Coordinator of Continuing Education for Social Work. Her job entailed preparing programs, coordinating and implementing these programs, and securing funding for them. Her students were social service providers working in agencies and board members of social service agencies throughout the State of

Oregon. She was not a teacher, but she recruited and supervised teachers for workshops, seminars, institutes, and conferences. Ms. Leonard did not do research and had no publications, but she prepared grant applications and received grant funds for such programs as Indian Social Work Education and Foster Parent Training Education. She received a total of $1,469,094 in grant training (as opposed to research) funds.

During this time she helped to develop and helped teach at PSU a course called "Women in Middle Years." This was an extension service course which was also an elective course for PSU students. In 1974, Ms. Leonard was promoted to associate professor and in 1977 she was granted indefinite tenure.

Prior to 1975, Ms. Leonard's salary was paid by the Division of Continuing

Education. Programs in the Division of Continuing Education are self-supporting -- i.e., the costs of the classes, including the salaries of teachers and coordinators, are funded by grants or by tuition fees. In 1975 and thereafter Ms. Leonard's salary was paid from the instructional budget of the School of Social Work at PSU even though her work was with the Division of Continuing Education.

In 1980, because of cutbacks in grants and budget reductions required by the Legislative Assembly, the PSU School of Social Work lost certain faculty members. At the same time student enrollment increased and grant training funds were becoming increasingly hard for Ms. Leonard to obtain. Dean Bernard Ross of the PSU School of Social Work decided to reassign Ms. Leonard from the

Division of Continuing Education to the School of Social Work where she was to become a member of the regular undergraduate teaching faculty. Prior to her reassignment she had been on a 12 month salary. When she was reassigned, her salary, like the salaries of all of the regular School of Social Work faculty, was a nine month salary. She suffered a corresponding reduction in pay.

As a result of the change in assignment and reduction in salary, Ms. Leonard filed a grievance with PSU. The Personnel Committee in the School of Social Work reviewed Ms. Leonard's claim. Ms. Leonard claimed that Jack Finley, Lynn Thompson, and Louis Curtis, males in the School of Social Work, were equally qualified males who performed substantially the same job as she performed but received higher salaries.

The Personnel Committee, composed of two men and two women, found that the differences between Ms. Leonard's salary and the three male faculty members' salaries were due to length of service and merit salary increases. The Personnel Committee recommended that Ms. Leonard's salary remain as set. However, she never received that salary. She took leaves of absence without pay during the 1980-1981 and 1981-1982 school years in order to write a book and then resigned effective June 30, 1982.

From 1968 until 1980, Ms. Leonard's salary was determined by the PSU School of Social Work, but that determination was based on comparable salaries within the Division of Continuing Education. She complains generally that her salary during this time was low, but when it is compared with others in Continuing

Education it is above the median. As to Ms. Leonard's specific claim, the court must first determine whether Ms. Leonard's three comparators are equally qualified men who have performed substantially the same job as she, but who had received and were offered in 1980 higher salaries than she had received and was offered upon her reassignment in 1980.

All of the comparators are associate professors with Masters Degrees in social work, the same as Ms. Leonard. Mr. Finley was promoted to associate professor and offered tenure in 1972, two years before Ms. Leonard was promoted and five years before she received tenure. He came to PSU one year before she did. Mr. Finley also had completed considerable course work toward a Ph.D. degree by 1980 and had done a

considerable amount of graduate student teaching. Mr. Thompson came to PSU at the same time as Ms. Leonard and was promoted in 1974, the same year as she was promoted. He became Assistant Dean of the School of Social Work in 1980 and before that taught graduate and undergraduate students. Mr. Curtis came to PSU in 1965 and had taught in both the undergraduate and graduate programs. Neither Ms. Leonard nor any of her comparators had significant publications.

As to whether or not she and her comparators performed substantially the same job, Ms. Leonard testified as follows with regard to a comparison between her job and Mr. Finley's:

> Q (Mr. Willner) All right, how would you compare the responsibilities of your two tasks, your job and his job?
>
> A Well, I -- I would say we had equal but different

responsibilities. His responsibility was to the students, the master's students at the school of social work, to the agencies that he was liaison to, and so was I. (Emphasis added.)

Also, I meant to say that in common we had not only those skills I mentioned previously, but we were advisees -- or advisors to students, to master's level students.

Q You both were?

A We both were. And we both were what they call faculty liaison to community agencies.

Q And how did ----

A We both did that, and we also advised, did advising to master's theses.

Q So how would you contrast the level of responsibility?

A Well, I would say it was about the same. The only -- but different. And the difference was that I see the State as sort of my constituency. I worked with State groups all over the State.

Jack tended to work more

localized, although he was active in ----

Q All right, how would you contrast the efforts that you had to put in with the efforts that he had to put in?

A It's hard to do that. I would say that Jack didn't get into grant writing, which is a special kind of expertise and skill and requires a great deal of effort. But he put a lot of effort into his admissions and to work with students. I think he worked very closely, had a good rapport with students. So I'd say equal but different. (Tr. 5365-5366) (Emphasis added.)

Ms. Leonard testified as follows with regard to a comparison between her job and Mr. Thompson's:

Q [By Mr. Willner] Compare yourself with Mr. Thompson, now, in terms of skill, effort and responsibility?

A Again, I would say equal but very different. Lynn's responsibility was at first for the undergraduate program before it became credited. He guided that program through a very difficult period and helped to see that it was

finally accredited. (Tr. 5367-5368) (Emphasis added.)

He did a lot more teaching than I did, and he did outside training. I know from his vitae that he did a lot of training of community groups. So he was active with community groups. He did a lot of teaching.

Q All right.

A He was a good teacher.

Q Overall, how do you compare the skills and efforts and responsibility of the two of you?

A Well, again, I think I'm going to have to say the same as I said with Mr. Finley. I think that the responsibilities were different but equal.

(Emphasis added.)

Ms. Leonard testified as follows with regard to a comparison between her job and Mr. Curtis':

Q [By Mr. Willner] All right, now, contrast your skills, efforts and responsibilities with Mr. Curtis.

A Lew Curtis had several years ahead of me. He came, I think, about two or three years before I did. He did some teaching in the undergraduate program. He did some teaching in the graduate program. His special area of expertise was in classroom scheduling, which is a very difficult thing to do. And I think the dean relied on him to do that a great deal. That was sort of a quasi-administrative position.

In addition, he had special areas. I believe he was interested in corrections. He came out of that field and that was -- he brought a great deal. And he was interested in the drug scene at the time that that was a problem at --

Q How would you evaluate overall his skills, efforts and responsibilities as against yours?

A Well, I think we had perhaps equal responsibility, but, again, very different.

(Tr. 5369) (Emphasis added).

While Ms. Leonard is arguably equally qualified with her male comparators, the job experiences of Ms. Leonard and her comparators are vastly

different. For ten years Ms. Leonard was involved in arranging for adult and citizen education throughout the State of Oregon. The courses she devised were pragmatic -- how-to-do-it-better for social workers in the field. She did little teaching. She was primarily an educational coordinator with funding responsibilities. Her male comparators were involved in teaching undergraduate and graduate students in a campus setting. They were involved in direct, traditional, learning-for-the-sake-of-learning responsibilities. They had little or no funding responsibilities. The social work courses her comparators taught had a curriculum designed by the School of Social Work faculty. Ms. Leonard either designed the curriculum herself or arranged for a teacher who designed his or her own curriculum. The

criteria against which the performances of Ms. Leonard and her comparators were judged were different. The length of their yearly appointments was different. Most students of continuing education are not members of the academic community but are working in their chosen field. Most graduate and undergraduate students are members of the academic community.

Ms. Leonard makes two claims: first, that she was underpaid as Coordinator of Continuing Education as compared to the pay of faculty in regular academic positions in the School of Social Work; and second, that her proposed salary after her transfer into a regular academic position in the School of Social Work was lower than the pay of Mr. Finley, Mr. Thompson, and Mr. Curtis, equally qualified males.

Her first claim is a comparable

worth claim; her complaint is not that her salary is too low when compared with the pay of others in continuing education, but rather that it is too low when compared with the pay of regular academic faculty in the School of Social Work. Ms. Leonard herself testified to the dissimilarities of her job and the jobs of her regular academic faculty comparators. For the court to find for Ms. Leonard on this claim, the court would have to substitute its judgment for that of the institution as to the relative worth of continuing education positions and regular academic positions. Such a result is foreclosed by this court's Order of August 10, 1984 and the decision in Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984).

As to her second claim, assuming that her job and those of her comparators were substantially equal, the court finds that the lower salary proposed for Ms. Leonard was reasonable in light of the greater experience of her comparators. Her comparators had been teaching undergraduate and graduate students in a regular academic setting during the ten years that Ms. Leonard was acting as Coordinator for Continuing Education. Hence, they had a good deal more experience than Ms. Leonard with respect to the position of teaching as a regular faculty member in the School of Social Work. The court finds that the defendant's explanation for Ms. Leonard's lower salary is reasonable and not pretextual.

Ms. Leonard cannot prevail on her individual claim.

DR. ELAINE SPENCER

Dr. Elaine Spencer, a retired associate professor of chemistry at Portland State University (PSU) claims that she was discriminated against because of her sex in that: (1) her starting salary in 1961 was lower than equally qualified men, and percentage and merit increases in pay over the years caused her to receive a lower salary than equally qualified men per forming substantially the same job; (2) she was not promoted as rapidly as equally qualified men performing substantially the same job; (3) she was evaluated on the basis of research and scholarship (a) while being prevented from working with graduate students, (b) while given heavier than ordinary teaching assignments, and (c) while being denied

research laboratory facilities, whereas equally qualified men performing substantially the same job were not burdened with these research and scholarship handicaps. Dr.Spencer filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) and on August 8, 1980 the EEOC sent Dr. Spencer a Notice of Right to Sue Letter.

CIRCUMSTANCES SURROUNDING

DR. SPENCER'S HIRING

Dr. Spencer was first hired by PSU in 1956 when PSU was still a college and only one year beyond being an education extension center. She was appointed as a temporary instructor in mathematics with some part-time teaching assignments in chemistry. She became a regularly employed instructor in 1957. At this time she had a B.S. degree in chemistry from Linfield College and a M.S. degree

in organic chemistry from Massachusetts Institute of Technology.

During 1959-61 Dr. Spencer worked on her doctorate which she obtained from the University of Oregon (now Oregon Health Sciences University) in 1961. She was then promoted to assistant professor and assigned to teach chemistry at a starting salary of $6,000. At the same time Dr. John Wirtz and Dr. Herman Taylor were hired as assistant professors assigned to teach biology at a starting salary of $6,250. Dr. Spencer contends that she was equally qualified with Dr. Wirtz and Dr. Taylor and performed substantially the same job as they performed and therefore should have received the same starting salary. She claims that she was told by her department chair, Dr.James Ferguson, that since she was a woman with an employed

husband and could not go elsewhere to find a job for more money, he did not need to offer her more money.

Dr.Ferguson was asked if he recalled making that statement to Dr.Spencer. He replied:

> "No. Well, the feeling was that she did have a husband, Carl, who was working at the -- I forget the name of the company but it was, we felt, a good job, and with our limited funds, $6000 was all that we felt could be offered her, although, that really went through Dean Peterson and the final amount of money was not in my responsibility. It was his matter of discussing the amount of money."

Def. Ex. 8102, Statement of James Ferguson, p. 8.

Undoubtedly, Dr. Ferguson made the statement about which Dr. Spencer complains. The problem is that in 1961 sex discrimination was not unlawful. Dr.Spencer claims that because salary

increases over the years have been based on a percentage of existing salaries, the discriminatory beginning salary that she received has caused her to receive a lower salary than equally qualified men performing substantially the same job during a time period when sex discrimination is unlawful.

First, despite the discriminatory overtones of Dr. Ferguson's statement, the $250 per year differential between the starting salaries of Dr.Spencer and Drs. Wirtz and Taylor was justified on the basis of legitimate job-related factors. For example, Dr. Taylor obtained his Ph.D. degree two years before Dr. Spencer obtained her Ph.D. degree, had served as a post-doctoral fellow for two years, and had seven publications in refereed[1] journals and three research projects in preparation at

the time of his hire, considerably more scholarly work than Dr. Spencer. Dr. John Wirtz obtained his Ph.D. in 1961, the same year as Dr. Spencer, but he had been an instructor for two years longer than she had been and also had more research productivity than Dr. Spencer.

Dr. Spencer here claims that chemists, such as she, are generally paid more than biologists such as Drs. Taylor and Wirtz. However, at PSU in 1961 at least two full professors who taught biology were paid substantially more than two full professors who taught chemistry.

Dr. Spencer next claims that Dr. Ferguson told her he had to give her some merit pay in 1962-63 because her work had been meritorious, but that he would not give her as much as allotted because her husband was employed.

However, Dr.Spencer's testimony on cross-examination refutes this claim.

> Q (By Ms. Rodgers) In 1962 you said that you received merit money. Do you know whether there was any range of merit money available for individuals or whether it was one amount?
>
> A I don't understand that question.
>
> Q How was the merit money calculated in 1962?
>
> A I did not know.
>
> Q Do you know anybody who received more than the amount of money that you received?
>
> A Not in 1962.
>
> Q You received the maximum?
>
> A I do not know whether I received the maximum or not.
>
> Q But you don't know anybody who received any more?
>
> A Nor anyone who received any less.
>
> Q You have to give a verbal answer.

A I really do not know what made up the decision to award me merit money at that time or how much.

Q But you don't know anybody who received more money than you did?

You have been shaking your head. You have to give a verbal answer for it to appear on the record.

A Yes. Not in 1962, the first raise that I received. Tr. 5242 - 5243.

In addition to the 1962 merit increase, Dr.Spencer received another equity increase in the early '70's and in 1978 when equity pay increases were given to faculty who had been hired when salaries were much lower and who were therefore earning much less than newer faculty members. From 1961-1982, Dr.Spencer received a 309% increase in her salary -- the highest percentage increase for anyone in the Chemistry Department at PSU.

Dr. Spencer complains that she has received a lower salary than four equally qualified males performing substantially the same job: Dr. Levenson, Dr. Brown, Dr. Roberti, and Dr. Mickleson. Drs. Levenson, Brown, and Roberti are full professors. Dr. Spencer's own testimony indicates that Drs. Levenson and Brown have done more scholarly research than she has and therefore are not equally qualified males.

> A Well, of course at the present time Dr. Levinson has had the opportunity to do quite a lot of research. And he has continued his teaching assignment at about the same level as my own. And he has been on many university committees.
>
> * * *
>
> Q [By Mr. Willner] All right. Compare yourself with Dr.Bruce Brown.

> A Dr. Brown has also had much more opportunity to do research and has been appointed to administrative positions through the years. (Tr. 5213).

Dr.Roberti came to Portland State in 1952 and was promoted to full professor in 1967. His higher salary can be attributed to his longer years of service and early promotions based on research and publication.

Dr. Spencer's career most closely parallels that of Dr.Mickleson. Both are associate professors; both are good/average teachers; and neither has published to any extent. Dr.Mickleson did receive a grant from the Petroleum Research Foundation in 1962 and has traveled to Denmark as part of the research fellowship. Also, Dr.Mickleson began teaching at PSU in 1955, the same year that he received his Ph.D. His

career spans more years than that of Dr.Spencer, and he has had his Ph.D. for six years longer than she has. Even with these differences, in 1979, Dr.Spencer made $21,112, and Dr.Mickleson made $21,766. The court cannot say that Dr.Spencer has received an unjustifiably lower salary than Dr.Mickleson.

RESEARCH AND PROMOTION

Dr. Spencer claims that she has been unable to conduct the research necessary to meet the scholarly activity criterion for becoming a full professor because (1) she was locked out of her laboratory; (2) she was denied access to graduate student assistants used in conducting research; and (3) she was given such a heavy teaching load that she did not have time to conduct research and prepare publications based upon that research. She also claims that these reasons

delayed her promotion to associate professor.

Currently at PSU, teaching, research and publication, and service to the institution and the community are all considered in promotion decisions, and in particular the promotion to full professor. In order to understand the role of research at PSU it is necessary to outline the history of PSU. Before 1955 PSU was an education extension center. It became a college in 1955. By 1960 it had only a general science department which offered courses for non-science majors in such subjects as chemistry and biology. In the mid-1960's PSU began to add graduate programs in the general science area. In 1967, the transition from a college to a university began. In 1969, Portland State College became Portland State

University and Ph.D. programs were authorized. Faculty such as Dr.Spencer, who were hired during the early years, were not terminated, but new faculty with credentials for working with Ph.D. candidates were hired. As of 1970, Dr.Spencer had not published any substantial work except a summary of her Ph.D. thesis which appeared in a non-refereed journal. She was, however, a competent teacher, and thus she was assigned a heavier teaching load than she might have had had she been a productive scholar. Dr.Spencer stated that this decision "made sense."

Dr.Spencer claims that she was essentially prevented from doing scholarship. However, Dr.Spencer did not actively and consistently seek out funding for research projects and did not write grant proposals to national

agencies for laboratory equipment. Until 1967, the Chemistry Department was in a building which was a condemned schoolhouse. Dr.Spencer had approximately the same research facilities as anyone else had, which were inadequate. In 1967, the Chemistry Department moved to Science Building I, which had improved laboratory space including research laboratories adjacent to each faculty member's office. Dr. Spencer had at all times until her retirement in 1984, the use of a small personal laboratory and the use of the main teaching biochemistry laboratory when it was not being used for teaching. At no time was she locked out of her research laboratory.

Men and women in the department were treated equally. For example, Dr. Joanne Loehr, a woman, had a relatively light

teaching load because she was extensively involved in research. Drs. Mickleson, Roberti, and Silverman, men, had relatively heavy teaching loads because they did little research. While Dr. Spencer's laboratory space was smaller than Dr. Kilgore's, a man, Dr. Kilgore's lab space was smaller than that of Dr.Loehr, a woman. The court concludes that Dr.Spencer was not unfairly treated as far as the use of the laboratories was concerned.

Dr.Spencer claims that if she had had access to graduate students she would have been able to perform research and therefore become a full professor. The fact is that Dr.Spencer was not a good supervisor for graduate students. She failed to supervise properly the work of Ellen Hannen, Mary Ellen Tracy, and David Swehla. Her name was therefore

removed from the list of graduate student research advisers. Furthermore, Dr. Spencer was unwilling to work summers during a time when graduate students were working. Also, graduate students are not necessarily a part of faculty research. Undoubtedly, they are of valuable assistance, but much faculty research is done alone or with the aid of undergraduate students.

PSU promotion and tenure guidelines prior to 1977-78 required demonstration of excellence in teaching, research, or service. But in 1977-78 the guidelines for promotion to full professor were changed to require excellence in all three areas. Dr.Spencer was promoted from assistant professor to associate professor for the 1974-75 academic year. This promotion was based on her service record and on her work with Dr. Mickleson

in preparing their general chemistry textbook, which was never published. Her promotion to full professor was denied because of lack of scholarship. Both the delay in her promotion to associate professor and the denial of her promotion to full professor are justified by her lack of scholarly activities and her good/average teaching and service records. The court concludes that she was never denied a promotion because of her sex.

Dr. Spencer cannot prevail on her individual claim.

Dr. Spencer Footnote

1. There are two kinds of academic journals, refereed and non-refereed. Refereed journals publish only those articles considered sufficiently original or significant by a panel of leading academics in the field as to merit publication. In contrast, articles published in non-refereed journals do not have to pass this kind of scrutiny. Publication of an article in a refereed journal is a substantially more significant accomplishment than is publication in a non-refereed journal.

DR. BARBARA STEWART

Dr. Barbara Stewart, an associate professor in the School of Nursing at the Oregon Health Sciences University (OHSU), claims that she was discriminated against because of her sex while she was an associate professor at Portland State University (PSU) working in the Institute on Aging (IOA). She claims that she was discriminatorily assigned to part-time work from November, 1979 through June, 1980. Dr. Stewart intervened in this action as a named plaintiff without filing a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC).

SEX DISCRIMINATION AND THE INSTITUTE ON AGING AT PSU

Dr. Stewart received her degrees from Purdue University: a B.A. in 1966;

an M.S. in 1968; and a Ph.D. in 1969. Her areas of study were psychology, mathematics, clinical psychology, and applied statistics. During this time she served as a teaching assistant and an instructor in the Department of Psychology at Purdue University.

From September, 1969 through June, 1970, Dr. Stewart was an assistant professor at PSU. From August, 1970 through August, 1976, she taught at Oklahoma State University where she was promoted to associate professor and granted indefinite tenure.

In the fall of 1976, Dr. Stewart returned to PSU as an associate professor. From then until 1981, when she became employed at OHSU, she served at various times in the Department of Psychology, the School of Urban Affairs, and the Institute on Aging. She was

evaluated for merit pay increases by the department or institute which paid the greater portion of her salary for any given year. Her salary for her work in the Department of Psychology and in the School of Urban Affairs came from state funds (denominated "hard" money), and her salary for her work in the IOA came from federal grant funds (denominated "soft" money). Except for certain summer terms, she was employed full time at PSU.

In order to understand Dr. Stewart's claim of sex discrimination, it is necessary to understand the relationship of the IOA to PSU and how its activities are funded. The IOA is not a department at PSU; it is a research unit of the School of Urban Affairs. It had budgeted to it by PSU only $60,000 to $65,000 for the budgetary period relevant to this case. All other funds

had to be obtained through research grants. IOA offers no academic courses; therefore, it is composed primarily of research assistants and research associates.

In 1979, the IOA had three tenure-track or tenured positions -- i.e., positions for which funds are committed yearly. These positions were held by Dr. Douglas Montgomery, the former acting Director of IOA, and Dr. Leonard Cain, one of the "old-timers" at PSU and the IOA. Dr. Richard Schulz, the new Director of the IOA, who came in January, 1979, was on tenure track and therefore the funds for his salary were also committed annually.

Between 1976 and 1979 almost all of the IOA's grant funds came from the Administration on Aging, an agency of the United States Government. However, by

1979, the Administration on Aging was in decline and was being supplanted by the National Institute on Aging, another federal agency with a different focus. During the summer of 1979 most of the IOA grants obtained from the Administration on Aging expired, and although grant proposals for between $200,000 and $500,000 in grant funds were submitted to various agencies, only one grant proposal for $30,000 was funded. The IOA faced immediate and drastic staff reductions. It is out of this funding calamity that Dr. Stewart's sex discrimination claim arises.

When Dr. Schulz learned that the $30,000 was the only grant forthcoming, he met with the Dean of the School of Urban Affairs, Nohad Toulon, and with PSU President Joseph Blumel in an attempt to obtain $90,000 in University

money in order to maintain existing IOA staff salaries until the next funding cycle in the spring of 1980. President Blumel had only $50,000 of discretionary funds available for use during the 1979-1980 school year for any and all contingencies that might arise at PSU. Even under these circumstances, President Blumel gave $30,000 to Dr. Schulz for the IOA staff salaries. No constraints on the use or distribution of these funds were imposed, but the IOA was still $60,000 short of funds necessary for full staffing.

Dr. Schulz then submitted for approval to Dean Toulon and to Dr. Margaret Dobson, Vice President for Academic Affairs, a plan for IOA staff salary reductions. In preparing his plan for staff salary reductions, Dr. Schulz did not consult with IOA staff members[1],

although he did consult with Dean Toulon. His plan was approved by Dean Toulon and Dr. Dobson.

On November 7, 1979, Dean Schulz presented his plan for staff salary reductions to the IOA staff. The plan, coincidentally according to Dr. Schulz, provided for all of the men to receive full-time salaries and for all of the women to receive part-time salaries[1]. The names of the men and women identified in Dr. Stewart's testimony and the percentages of planned salaries for each for 1979-80 are listed as follows:[2]

MEN

Dr. Richard Schulz 100% (1.0 FTE)
Dr. Douglas Montgomery 100% (1.0 FTE)
Dr. Leonard Cain 100% (1.0 FTE)
Michael DeShane 100% (1.0 FTE)
Fred Keast 100% (1.0 FTE)
Gary Holznagle 100% (1.0 FTE)

WOMEN

Dr. Barbara Stewart 60% (.6 FTE)
Lois Copperman 50% (.5 FTE)

Margaret Neal 80% (.8 FTE)
Diana White 80% (.8 FTE)
Annie Wilkinson less than 50%(.5FTE)
Marlene Peterson " " " "
Ellen Jean 80% (.8 FTE)

See Def. Ex. 8149, Statement of Richard Schultz, p. 52 and Tr. - 6826.

Dr. Stewart and Dr. Montgomery[3] testified that they as well as others were surprised, shocked, angered, and embarrassed at the meeting, and that they stated their grievances to Dr. Schulz when the plan was announced. Dr. Schulz testified that the meeting was a short, twenty minute affair, and that he was unaware of Dr. Stewart's complaint until he received an affidavit from Dr. Stewart a year-and-a-half later, when she became a named plaintiff in this case. In any event, the plan was not changed, and no grievances were filed with PSU or the EEOC.

PURPOSE OF THE PLAN

No one disputes that an immediate staff salary reduction was necessary. There were insufficient funds to pay everyone the way he or she had anticipated being paid. No one disputes that the plan devised by Dr. Schulz had been approved by the Dean of the School of Urban Affairs and by the Vice President for Academic Affairs, who was a woman. Dr. Stewart contends, however, that Dr. Schulz's motives in drafting the plan were discriminatory. She testified as follows:

> Q (Mr. Willner) Did you ask Dr. Schulz for any explanation?
>
> A Yes, I did. I said that in light of the fact that I was head of research operations and that I felt that I was a rather central person in the institute on aging, I said I didn't understand why -- why my funding was only going to be an additional 24 percent, total .60 FTE and that Michael DeShane and Fred Keast and Gary

Holtznagle were at 1.0. It didn't make any sense to me. And the first response that Mr. Schulz told me was that the university had agreed to pay people what they typically had worked for in the past. And my reaction to that was well, you know -- and that people who had not worked full time in the past would not be paid full time now. And my response was, well, I have worked less than full time in the summers but always during the academic year I have worked full time. And then an additional reason was given and they said well, people ----

Q You said "they said." Who said?

A Richard Schulz said.

Q All right.

A That they were trying to determine -- I want to remember the exact type of phrasing. It's probably not verbatim, but pretty close. They wanted to pay people a minimum of what was needed to keep them. And so they decided, you know, that they would give that funding on what they thought was the minimum to keep people at the Institute and that they would be willing to work, and that they took -- they also took

into consideration family obligations and whether or not a person was single and suggested that kind of their financial needs would be taken into account in making those decisions.

Q Did you make any statement about what Dr. Schulz had said about -- what you just testified to?

A Well, I indicated that I thought that it sounded as -- because all of the men were being paid full time and none of the women were, that it certainly sounded like some kind of sex discrimination. And I'm not sure if I remember the exact sequence of everybody speaking.

And Leonard Cain, I think he piped in before that and he said that he was embarrassed that he had not questioned the decision-making, the rationale for the decision-making and also thought that some of the decisions did not sound quite right.

And I guess what surprised me is then nobody had any other explanations. It was just real silent. And of course in this room here was Michael DeShane who was going to get full time and Gary Holtznagle who was

going to get full time and Doug Montgomery and Leonard Cain and Richard Schulz were already regular faculty members and receiving full time pay. And Dianna White, who was a graduate student at that time, was going to receive 80 percent. And I was just surprised. I was really stunned. It was just like silence. Nobody had any other explanations for me.

Q Did you say anything about two women researchers?

A Yes, I did point up and I said that one of the things that especially concerned me was that that fall we had received one federally funded grant that had been written by Margaret Neal and Dianna White. Though that grant paid for half of their salary and that what the institute was saying in effect was that they would give those two women an additional 30 percent. And I said that it's interesting that the only two people who brought in grant funds were not even being funded a hundred percent and I found that troublesome. (Tr. 6828 - 6831)

Dr. Schulz denied that he took into consideration family obligations or the

marital status or prior workloads of IOA staff members in determining how to make salary cuts. He claims instead that the plan was designed to retain those people who were the best and most prolific grant writers so that grant proposals could be prepared and grant funds received during the next funding cycle. Specifically, Dr. Schulz testified as follows:

> Q (Ms. Rogers) What decision, then, was ultimately reached as to how the money would be distributed? Who was to receive it?
>
> A The decision was based on mine and in part the dean's best estimation of how to invest those monies in a way that would likely give us the largest return in the next funding cycle. That involved identifying those individuals who we felt critical to producing funds the next time around. (Def. Ex. 8149 p. 28)

In order to determine whether Dr. Stewart and the other women in the IOA

were discriminated against because of their sex, the court must determine whether the evidence supports Dr. Stewart's claim of discrimination or Dr. Schulz' claim that he made salary cuts to fulfill his stated goal. The court will begin with an analysis of each of the men and each of the women about whom Dr. Stewart testified.

DR. RICHARD SCHULZ

Dr. Schulz came to PSU in January, 1979, as the Director of the IOA on a tenure track position with a three year contract. The moneys allocated for his salary were committed funds from the IOA - i.e., hard money. His salary was "guaranteed" insofar as any salary can be guaranteed. It would have been unreasonable - even ridiculous - to expect him to reduce his own salary in

the staff salary reduction plan.

DR. DOUGLAS MONTGOMERY

Dr. Montgomery was the former acting Director of the IOA. Dr. Montgomery was also on a tenure track position. The funds for his salary were committed funds from the IOA - again "guaranteed" insofar as any salary can be guaranteed. Dr. Schulz had no authority to reduce Dr. Montgomery's salary in the staff salary reduction plan. In other words, he could not have reduced Dr. Montgomery's salary had he so desired.

DR. LEONARD CAIN

Dr. Cain was a tenured faculty member from the Department of Sociology who performed certain duties in the IOA. The funds for his salary were committed funds from the Department of Sociology. Dr. Schulz had no authority to reduce Dr.

Cain's salary had he so desired.

GARY HOLZNAGLE

Mr. Holznagle was the IOA bookkeeper and supervisor of support staff. His role in the IOA was different from the other staff members. He wrote and supervised grant budgets, making sure that the budget portion of grant proposals met federal and state regulations. He also supervised the budgetary aspects of grant funds after they were received - again making sure that principal investigators met federal and state regulations. Mr. Holznagle was also in charge of preparing closing reports on grants, four of which had to be prepared in November, 1979. Since grant proposals which included budget proposals had to be prepared for the spring, 1980 funding cycle, and since four closing reports with budgetary

aspects had to be prepared for grant projects that had been concluded during the summer of 1979, there was nothing discriminatory in Dr. Schulz' decision to retain Mr. Holznagle at full salary in November, 1979.

LOIS COPPERMAN

In her direct testimony Dr. Stewart did no more than mention Ms. Copperman as someone who would be funded at less than 1.0 FTE. In her cross-examination Dr. Stewart testified as follows: . . .

> Lois Copperman typically worked less than 1.0, I believe at her request.

(Tr. 6855).

Dr. Schulz testified that Ms. Copperman was funded at .5 FTE at her request. There was nothing discriminatory in Dr. Schulz' decision to retain Ms. Copperman at .5 FTE in

November, 1979.

MARGARET NEAL and DIANA WHITE[4]

Ms. Neal and Ms. White had received a grant for $30,000, the only grant received for the fall of 1979. This was a small grant and the only one they had ever received. Ms. White was completing her Master's Degree in November, 1979 and Ms. Neal was a graduate student. In her cross-examination Dr. Stewart testified as follows:

> Q (By Ms. Rogers) Neal and White ----
>
> A Yes.
>
> * * *
>
> Q Were those two people graduate students at that time?
>
> A Dianna White was finishing her Master's thesis the fall of 1979, which she did in November. And then she was not -- no longer a student. In other words, she was going to have what one would refer to

as a terminal Master's Degree. She was not planning to go on for her doctorate at that time.

I'm not sure at that time whether or not Margaret Neal was a student. I know that she had already received her Master's Degree. And sometimes students will go for -- will finish a degree and then not re-enroll for a period of time during which they will work as a research assistant. And then sometimes they will go back to school. So I don't know exactly if that was a period that she was enrolled as a student or not. She may very well have been.

Q Were any of them subsequently enrolled in Ph.D. programs?

A Margaret Neal was, yes.

Q Do you have any idea whether she was enrolled in the Ph.D. program in the fall of '79?

A I am not sure.

Q In fact, their history with Portland State and the Institute on Aging had always been as kind of a fill-in as they were needed on particular grants, with the exception of the one grant that they had written, the small one?

A I guess I react to the word fill-in in a not positive way, because you didn't ask it in the same way for Fred Keast. They were involved in working on important projects, as he had been.

Q But by invitation of the principal investigator or as they were needed by a principal investigator to do a piece of a project?

A They were usually hired for the entirety of a project, assuming the funds allowed that, to carry out a portion of that project as a research assistant.

Q But they had not been principal investigators until they had actually received this ----

A Correct, correct. (Tr. 6856 - 6858)

Dr. Schulz testified that Ms. Neal and Ms. White were not in grant funding or research leadership roles but that they played very important supportive roles. There was nothing discriminatory in Dr. Schulz' decision to retain Ms.

Neal and Ms. White at .8 FTE in November, 1979.

ANNIE WILKINSON and

MARLENE PETERSON

On direct examination Dr. Stewart testified as follows about Ms. Wilkinson and Ms. Peterson:

> It was also indicated that Ann Wilkinson would receive some amount less than 1.0 FTE and not for the entire year, so that was not specified completely. And that Marlene Peterson would receive .50 FTE or less for two or three months in the fall and 0 FTE for the rest of the year.

(Tr. - 6826).

Dr. Stewart was asked no questions about Ms. Wilkinson and Ms. Peterson on cross examination; however, Dr. Schulz testified as follows:

> Q (by Ms. Rogers) Ann Wilkinson?
>
> A Ann Wilkinson. Ann Wilkinson also was a student and would fall generally into

> the same category that Margaret Neal and Diana White. She had up to the point not demonstrated any initiative on her own with respect to money generation. And I had no expectation that she could in the future.
>
> Q Marlene Peterson?
>
> A Marlene Peterson was also a graduate student at the time. And again, she had played important supportive roles but was not an initiator of ideas or grant proposals that appeared to be fundable. (Def. Ex. 8149, P. 55)

There was nothing discriminatory in Dr. Schulz' decision to retain Ms. Wilkinson and Ms. Peterson at less than full salary in November, 1979.

ELLEN JEAN

Both Dr. Stewart (on cross examination) and Dr. Schulz testified that Ms. Jean had requested maternity leave and a half-time appointment. As of November 7, 1979, she had not requested an increase in her workload.

There was nothing discriminatory in Dr. Schulz' decision to retain Ms. Jean at less than full salary in November, 1979.

There is no evidence in the record to support Dr. Stewart's claim that "women" in the IOA were discriminated against by Dr. Schulz in November, 1979.

The court will now examine Dr. Stewart's individual claim as it relates to Michael DeShane and Fred Keast. The issue is: was Dr. Stewart's salary reduced because she was a woman and were Mr. DeShane's and Mr. Keast's salaries funded at 1.0 FTE because they were men or were the salary decisions regarding Dr. Stewart, Mr. DeShane and Mr. Keast the natural result of a stated and non-discriminatory goal -- that is, to retain those people who were the best and most prolific grant writers so that grant

proposals could be prepared and grant funds received during the spring 1980 funding cycle?

DR. STEWART

From 1976 until she left in the fall of 1981, Dr. Stewart served on a part-time basis as a methodologist in the IOA. The salary for her services in the IOA was paid with grant funds -- soft money. She also served as a regular teaching faculty on a part-time basis in either the Department of Psychology or the School of Urban Affairs. Her salary for her services in the Department of Psychology and the School of Urban Affairs was paid from University funds -- hard money.

Dr. Stewart's duties in the IOA were primarily as a methodologist. She had no subject matter specialty relating to aging such as pensions, housing, or

social security, but she was used as a consultant and a statistician by the specialists to analyz data, to gather data, to assist with experimental measurement, etc. She was basically a part-time "support" person to all of the primary investigators[5] and she worked with graduate students. In her role as consulting methodologist Dr. Stewart performed well.

Dr. Stewart had also served in an administrative role in the IOA as research coordinator for all of the grants. As research coordinator she monitored the progress of each grant, reported to the Director of the IOA about the progress of each grant, and worked to insure that grants were completed on time. Her performance in her administrative role was not satisfactory. For example, a housing grant for which

Dr. Stewart was the primary methodological consultant and for which she had administrative duties had inordinate problems and delays. A client-relations project for which Dr. Stewart served as the primary administrative overseer was several years behind schedule.[6]

In summary, then, at the time Dr. Schulz made his decisions regarding staff salary reductions he considered Dr. Stewart to be a good and willing consultant and an excellent teacher in the School of Urban Affairs, but he did not consider her to be a grant proposal writer, since she had never obtained any grant funds, and he did not consider her to be a good administrative coordinator. Furthermore, Dr. Schulz was himself a methodologist and his expertise and that of Dr. Stewart overlapped to some

extent. If her hours were to be reduced, he would be able to do some of her work himself.

On the other hand, Mr. DeShane was a proven grant writer. In 1979 he was the primary investigator of a $200,000 Attitudes on the Elderly grant. Mr. Keast was a fast and prolific writer -- the major writer of one of the grants that expired in 1979 --and his primary field of interest was in an area considered by Dr. Schulz to be ripe for future funding. Both had full appointments in the IOA and did not have responsibilities to the School of Urban Affairs, as did Dr. Stewart. Neither Mr. DeShane nor Mr. Keast was known for excellence in teaching as was Dr. Stewart; neither Mr. DeShane nor Mr. Keast was known as a good consultant as was Dr. Stewart; neither Mr. DeShane nor

Mr. Keast had a Ph.D. degree as had Dr. Stewart. But excellence in teaching, excellence in consulting, and Ph.D. degrees were not what was needed at that time. Grant writing skills were.[7]

The court concludes that in November, 1979, when Dr. Schulz faced a financial crisis that came close to "wiping out" the entire IOA[8], Dr. Schulz' explanation for retaining Mr. DeShane and Mr. Keast at full salary and reducing Dr. Stewart's salary is a reasonable explanation and not a pretext for discrimination.

Dr. Stewart cannot prevail on her individual claim.

DR. STEWART FOOTNOTES

1. Dr. Schulz was under no obligation to consult with IOA staff members regarding his plan for staff salary reductions since the IOA was not a department with a traditional, collegially-oriented, decision making process. Had he done so, however, he might have avoided some of the surprise, shock, anger, and embarrassment that was expressed when the plan was revealed to the IOA staff on November 7, 1979.

2. This list does not include support staff such as secretaries or others who played relatively minor roles in the IOA.

3. The relationship between Dr. Schulz and Dr. Montgomery was admittedly hostile, even combative. Dr. Schulz was responsible for Dr. Montgomery's failure to obtain tenure and the termination of his employment at PSU. Dr. Montgomery is a biased witness. The court discounts his testimony.

4. Shortly after the November 7, 1979 meeting, additional funding was found for Ms. Neal and Ms. White.

5. Dr. Stewart was the primary investigator for only one grant which was obtained in 1980.

6. Dr. Schulz testified that while it is not uncommon for a grant project to be late, it is ordinarily unacceptable for a project to be more than six or nine

months late. Lateness in completing grant projects jeopardizes the ability of an institution to obtain other grants. The project for which Dr. Stewart became primary investigator in 1980 was 18 months late in completion and was then completed only after the IOA had expended some $10,000 of its own money beyond the grant funds.

7. In the spring, 1980 funding cycles writing skills "paid off." Mr. DeShane, Mr. Keast, Ms. Copperman, Dr. Schulz, and Dr. Stewart all received funding for grant proposals they wrote.

8. Dr. Stewart's own testimony indicates the magnitude of the financial crisis. She testified as follows:

> Q (By Ms. Rogers) And what had happened in November of 1979 was simply that of those two to three hundred thousand to half a million dollars worth of grants, only 30,000 were funded?
>
> A Yes, that's true.
>
> Q And that decision came to the institute sometime in October, November of 1979?
>
> A Yes, it did.
>
> Q And that was a tremendous drop in funding for the institute, wasn't it?
>
> A Yes, it was.

Q Almost wiped it out, wouldn't you say that's correct?

A It would probably come close to that, yes.

Q The next funding cycle then would have been in the spring of 1980, wouldn't it?

A Yes, it would have been.

Q And before that cycle could occur, for the interim there was no grant money coming in after November of 1979?

A No, there would not have been. Not that I know of.

(Tr. - 6836).

MICHELE WOLLERT

Michele Wollert, a resident of Saskatoon, Saskatchewan, Canada, claims that she was discriminated against because of her sex while she served as a faculty member in the Theater Department of the College of Arts and Letters at Portland State University (PSU) from 1976 to 1983. Specifically, she claims that because of her sex (1) she was not promoted to assistant professor in 1977; (2) she was not placed on tenure track until 1979; (3) she was not promoted to associate professor until 1983, while a male comparator, who was hired as an assistant professor in 1977, was promoted to associate professor in 1981; and (4) she was paid less than an equally qualified man who performed substantially the same job as she performed from 1976-82. Ms. Wollert did

not file a charge of discrimination with the Equal Employment Opportunity Commission. She did not file any internal grievances with PSU.

Ms. Wollert received a B.S. degree in speech and theater in 1972 and an M.A. degree in theater and drama in 1976, both from Indiana University. Prior to coming to PSU in 1976, she served as a faculty assistant in costuming, Indiana University, 1974-76; scenic artist, Kentucky Opera Association, Louisville, Kentucky, 1972-73; instructor of stage craft/scene design, Indiana University High School Drama Institute, summer, 1972; and costume/scenic designer, Steamboat Cabin Theater, Jeffersonville, Indiana, 1972.

About 1976 when she received her M.A. degree, Ms. Wollert noticed an advertisement placed by PSU in the

American Theater Association Placement Bulletin seeking a person for the position of costume designer/scene designer, an academic position at the rank of assistant professor. She applied for the job. PSU had placed the advertisement because it anticipated that the person who was the scenery designer was going to be terminated. However, that person was not given timely notice of his termination, and therefore he was allowed to remain until the spring of 1977. As a result, PSU did not respond to Ms. Wollert's application.

Sometime later in 1976, Ms. Wollert and her husband moved to Portland, Oregon, where he had an internship in medical psychology at the Oregon Health Sciences University. In the fall of 1976, a person holding the position of Seamstress II, a classified position,

unexpectedly resigned from PSU. This was a position requiring only a high school diploma. Ms. Wollert was invited to accept that position, and she did so. Her job was to teach students how to design and construct costumes for PSU theatrical productions; to maintain the costume shop; to hire support personnel; and to buy supplies and equipment. As a classified employee she had no teaching or advising duties, and she was not required to serve on faculty committees, although she voluntarily attended faculty meetings and assisted students when ever she felt it necessary to do so.

She served in the position of Seamstress II for seven months. Thereafter, Ms. Wollert and the chairman of her department persuaded the Oregon State Employees' Association and PSU

administrators to change the position of Seamstress II, a classified position, to an academic position. Final approval of the reclassification came shortly after September 7, 1977. She was given the rank of instructor for the 1977-78 academic year.

Ms. Wollert first claims she was discriminated against because she did not receive the rank of assistant professor rather than the rank of instructor when the classified position became an academic position. In response to this charge, Dr. John Trudeau, who was then the Dean of the College of Arts and Letters, testified that there were no new monies available in September, 1977, to fund the position as assistant professor, because the position had been budgeted as a classified position. In fact, in order to fund the position at

the instructor level, he had to take money from the School of Arts and Sciences Student Fund and from the Service and Supply budget and add these monies to the Civil Service funds Ms. Wollert would have received as a classified employee. Thereafter, Dr. Trudeau budgeted for Ms. Wollert's position as assistant professor for the 1978-79 academic year. Dr. Trudeau testified that he could not "promote" Ms. Wollert to the rank of assistant professor and then pay her a salary appropriate for the rank of instructor. Dr. Trudeau's explanation is a reasonable one. The court concludes that sex discrimination was not the reason Ms. Wollert received the rank of instructor instead of the rank of assistant professor in September, 1977.

In the summer of 1978, the position

Ms. Wollert held as instructor was upgraded to the position of assistant professor of costume design. Funds had been budgeted for this position. Ms. Wollert was required to apply for and compete with other applicants for this position because of PSU affirmative action guidelines. A national search was conducted. After a national search, Ms. Wollert was selected for the position of assistant professor of costume design for the 1978-79 academic year.

Ms. Wollert's next claim of sex discrimination arises from being hired as an assistant professor of costume design on a fixed-term appointment, rather than on a tenure track appointment. The facts are undisputed that she received two offers of appointment: one dated July 3, 1978, which listed the position as "tenure

track"; and another dated July 7, 1978, which listed the position as "fixed-term." Ms. Wollert claims that the position was changed from tenure track to fixed-term because she, as a woman, was the successful applicant. In her direct testimony, however, she offers no reason why she signed and accepted the offer of appointment dated July 7, 1978, at fixed term rather than the offer of appointment dated July 3, 1978, at tenure track.

Jack Featheringill, the then-department chair, testified as follows:

> Q [By Ms. Rodgers] Were you able, as department head, to subsequently have the position elevated to assistant professor rank?
>
> A Yes, I believe so. I don't recall the specific paper work on it, but I believe we then were able to get it changed to assistant professor tenure track position and do a formal search in which Michele could

be considered as one of the applicants.

Q I think you just stated, Professor Featheringill, that that position was a tenure track position. Was it tenure track that year or was it later converted to tenure track?

A That's right. It was the first year assistant professors were unable to get the tenure track. I think we did not get that till a later year.

Q Okay. Was that your first search as department head, the first search that you had conducted?

A Yes.

Q Do you recall sending a letter of offer to Michele Wollert, who was a successful candidate of that search? Let me show you ... the letters of July 3rd and letters of July 7.

A Yes. Looking at both of those letters, I don't actually recall, either, specifically. Except certainly when someone's appointed, you send out a letter.

Q Did you originally author the body of those letters?

A No. These letters are both prescribed formats with information of what was to be stated, what statement must be made about administrative rules and so forth. And the type of letter, at least by me as a chairperson at that time, was being done by models set down by the dean or in file in our office.

A Okay. It's not an original creative effort?

A No.

Q Do you recall doing two letters?

A No. This is strange, I have no recall of it. I see the first one offers the position as tenure related and the second one specifically states that it's a fixed term appointment which will not accrue in time towards tenure or sabbatical. It looks as though a wrong model was used for the letter. I do not recall the sequence of events surrounding the change from one letter to the other. I don't know, for instance, if I provided Michele with the first letter, or just sent it to the dean for approval and there it got rejected and I was told I couldn't use another model before contacting

Michele. I really have no recall of that switch of models.

. . .

Q That's all right. We're simply looking for an honest recollection. Do you recall whether the position was advertised as a tenure track position?

A Yes, it was. That would have been the job advertisement to begin fall '78?

A Correct.

Q Then let me ask you if you have any recollection of withdrawing the July 3, 1978, offer of a tenure track position and replacing it with an offer of a fixed term position because the successful applicant was a woman?

A No.

Q Then, do you have any recollection? Your answer is you don't have any recollection?

A No, I have no recollection withdrawing it because she's a woman.

Q Let me ask you if you would have withdrawn it because this

successful applicant was a woman.

A Absolutely not.

(Statement of Jack Featheringill, Sept.6, 1984, pp. 38-41).

Dean Trudeau also testified regarding the change in Ms. Wollert's position from tenure track to fixed-term:

Q [By Ms. Rodgers] Do you recall whether that position was fixed term or tenure track for that first year?

A It was advertised as an annual tenure track position but changed to fixed term due to an unforeseen hiring freeze.

Q Do you recall when it was authorized to be filled on a tenure track?

A It was recommended in early '79. February I believe of '79 and approved, but would not take effect until September of that year. So it would be the academic year '79-'80 that it would become effective.

Q Since there had been a national search conducted the previous year, was a national search required for con version

of the position to tenure track?

A No, no, that wouldn't affect it.

Q When the position was converted to tenure track, do you recall the number of years credit towards tenure that Michele Wollert was given?

A She was allowed one year (78-79) as prior service.

(Statement of Dean Trudeau, Aug. 27, 1984, pp. 41, 42).

Ms. Wollert served as an assistant professor, fixed-term, during the 1978-79 academic year. For the academic year 1979-80, she was placed on tenure track and given one year tenure accrual for the 1978-79 academic year. The testimony of Mr. Featheringill and Mr. Trudeau is believable. There is no evidence that Ms. Wollert was discriminated against because of her sex in 1978-79 when she was placed on a fixed-term appointment

for one year and thereafter allowed tenure accrual for the 1978-79 academic year.

Ms. Wollert next claims that she was discriminated against because of her sex in that she was not promoted from assistant professor to associate professor as rapidly as she should have been. Ms. Wollert became an assistant professor in September, 1978. At PSU, unlike the other institutions, every faculty member is considered for promotion every year, whether eligible or not. Therefore, Ms. Wollert was first considered for promotion in 1980. At that time the minimum time for eligibility for promotion to associate professor was 3.0 FTE years in rank as assistant professor. Therefore, in 1980 and 1981 Ms. Wollert was not eligible for promotion. From October, 1980, until

January, 1982, she was on full-time maternity leave. As soon as Ms. Wollert became eligible for promotion, she was recommended for promotion. Had she not left PSU in 1983, when her husband accepted a position in Saskatchewan, Canada. She would have been promoted to the rank of associate professor. The court concludes that Ms. Wollert has no promotion grievance against PSU.

Ms. Wollert next claims that she was discriminated against because of her sex in that she was not granted tenure in a timely fashion. Ordinarily, tenure is granted only after 5.0 FTE years of service in a tenure track position. Ms. Wollert was placed in a tenure track position in September, 1979, but given credit for tenure track for the academic year 1978-79. Therefore, Ms. Wollert should have been qualified for tenure in

1982. Her department chair recommended that tenure be deferred because Ms. Wollert had only 3.29 FTE years credited toward tenure due to requested leaves of absence and requested reduced appointments.[1] The department chair later reconsidered his decision and supported an award of early tenure despite the fact that Ms. Wollert lacked 1.71 FTE years required for tenure. The evidence indicates that Ms. Wollert was the only faculty member at PSU who had received an early award of tenure. The court concludes that Ms. Wollert cannot prevail on her claim of sex discrimination regarding tenure.

Ms. Wollert's last complaint is a salary complaint. She claims that she is equally qualified with Glenn Gauer and has per formed substantially the same work as he has performed, but that she

has received less pay than he has received. Mr. Gauer is a scene designer who came to PSU as an assistant professor in September, 1977, at the same time that Ms. Wollert's position of Seamstress II became an academic position and she was given an appointment at the rank of instructor. At that time Mr. Gauer had had three-and-one-half years of prior experience as an assistant professor, including some period of time at Carnegie Tech., which is a prestigious school of theater design. Mr. Gauer has a Master of Fine Arts degree, which is a terminal degree. Ms. Wollert does not have a terminal degree. Furthermore, Ms. Wollert's only teaching experience before coming to PSU was as a graduate student. As a classified employee during the 1976-77 academic year she did not do any teaching. Mr. Gauer's

starting salary at the rank of assistant professor in 1977 was $13,385. In 1978, when Ms. Wollert was appointed to the rank of assistant professor, her salary was $13,000. In 1982, when Mr. Gauer was promoted to the rank of associate professor, he was paid $19,850. That same year, Ms. Wollert, who was still an assistant professor, was paid $18,854. Between 1977 and 1983, Mr. Gauer's salary increased 37.4%, while Ms. Wollert's salary increased 43%.

Assuming but not deciding that the positions of scene designer and or costume designer are substantially equal positions, Ms. Wollert cannot prevail on her sex discrimination in salary claim.

Ms. Wollert Footnote

1. Ms.Wollert's FTE is shown as follows:

1978-79	1.0 FTE
1979-80	1.0 FTE
1980-81	.46 FTE
1981-82	.33 FTE
1982-83	.50 FTE

UNIVERSITY OF OREGON

EUGENE, OREGON

Madronna Holden

Lois Schreiner

Dr. Ruth Waugh

DR. MADRONNA HOLDEN

Dr. Madronna Holden, formerly assistant professor of anthropology and Director of Ethnic Studies at the University of Oregon (U of O), claims that she was discriminated against because of her sex while serving as Director of Ethnic Studies in that: (1) she was paid less than Dr. George Mills, an equally qualified man who preceded her as Director of Ethnic Studies; (2) she was not given administrative or economic assistance in fulfilling her duties as Director of Ethnic Studies; (3) she was given a heavier workload than male administrators and program directors; and (4) she was not given access to U of O grievance procedures due to her participation in this lawsuit. Dr. Holden filed a complaint with the Equal Employment Opportunity Commission and

received a Right to Sue Letter dated August 8,1980.

Dr. Holden received a B.A. degree in philosophy from St.Martins College in 1968 and an M.A. degree and a Ph.D. degree in anthropology from the New School for Social Research, New York City, New York, in 1971 and 1974, respectively. While she was working for her Ph.D. degree, Dr. Holden served as an assistant professor of anthropology at the State University of New York, Oneonta College Campus. She has also held various research assistant positions and has attended a summer folklore seminar at Harvard University. Immediately prior to coming to the University of Oregon in 1976, Dr. Holden was engaged in grant-funded research collecting folklore and oral history from Native Americans in the State of Washington. At the time of her

hire, she had part of her work accepted for publication as a lead article in the Journal of American Folklore, a refereed journal.

The Ethnic Studies Program, an interdisciplinary program, began at the U of O in the early 1970's. The purpose of the program was to promote cultural pluralism among U of O students. The Ethnic Studies Program was intended to increase awareness of the history and culture of minority groups among all U of O students, but in particular minority students. The Ethnic Studies Program was not intended as a minority support program however.

The person hired to develop the program was Dr. George Mills, who served as director during the 1973-74 and 1974-75 academic years. Dr. Mills and various graduate teaching assistants

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ANNOUNCEMENT

UNIVERSITY OF OREGON

College of Liberal Arts
office of the dean

EUGENE, OREGON 97403
telephone (code 503) 686-3001

ANNOUNCEMENT OF POSITIONS IN ETHNIC STUDIES

The University of Oregon is accepting applications for one, and possibly two, teaching/administrative positions in its Ethnic Studies Program. Salary and level of appointment depend upon the qualifications of the candidates.

These are full-time joint appointments with the Ethnic Studies Program and an academic department in the College of Liberal Arts. The academic field is left open, with a preference for anthropology, history, literature, political science, psychology, or sociology. Candidates must have credentials acceptable to the academic department (Ph.D., college teaching experience, with a record of scholarly publications preferred), and must give evidence of competency in and commitment to ethnic studies.

The positions involve both administrative and academic responsibility. The candidates would teach in an academic department and both teach and carry administrative responsibilities in the Ethnic Studies Program. Appointees must be able to work effectively with the faculty and administration to strengthen the undergraduate Ethnic Studies Program and to develop upper division courses. The University of Oregon is an equal opportunity/affirmative action employer.

Applications must be received by April 1, 1976 to be considered. Send Vita and references to:

Ethnic Studies Search Committee
c/o Guido Palandri
Library
University of Oregon
Eugene, Oregon 97403

DEFENDANT'S EXHIBIT 3772 A

taught the courses in the Ethnic Studies Program. Dr. Mills died suddenly in August, 1975. Since it was too late to hire anyone to replace Dr. Mills for the 1975-76 academic year, the Ethnic Studies Program was administered that year by a group of five faculty members from other disciplines who were interested in and/or taught in the program. During the 1975-76 academic year an "Announcement of Positions in Ethnic Studies" was published in the Chronicle of Higher Education. A copy of that announcement follows this page. Dr. Holden saw that announcement and applied for one of the positions.

After screening hundreds of applicants, the U of O offered positions to two people: Dr. Holden and Dr. Clarence Williams.[1] Dr. Williams was offered the position of Director of

Ethnic Studies/assistant professor of history, and Dr. Holden was offered the position of Assistant Director of Ethnic Studies/assistant professor of anthropology. Dr. Williams did not accept the offer. Dr. Holden was then offered a new position: Director of Ethnic Studies/assistant professor of anthropology. Dr. John Baldwin, then-Dean of the College of Arts and Sciences, testified as follows:

> It had been envisioned that Clarence Williams would be the director. An older person, more experienced, so forth. He declined the offer at a time when Madronna Holden was still considering what she should do. The minute he declined, I was in phone contact with Dr. Holden, explaining the situation to her, making clear that if she came, that is, we couldn't very well prolong our search in the middle of the summer and anticipate recruiting a person of appropriate background and quality. The offers were made simultaneously or nearly

simultaneously. Dr. Holden knew of the situation with respect to the second offer prior to her decision.

. . .

I'm trying to say this properly. I personally informed Dr. Holden, while she was still considering the Oregon offer, that were she to come in the fall, she would be the chief person in ethnic studies and would have rather more administrative responsibilities and correspondingly reduced teaching responsibilities than would have been the case if we had had a second person.

Q [By Mr.Lidz] Did you offer Dr. Holden any adjustment in her salary as a result of her accepting the director's position rather than an assistant director's position?

A No. Perhaps I should clarify that, that simple no answer.

Program directors in the college are compensated through their regular academic salaries. That is, when a person who is in the English department becomes director of general literature for a year, nothing happens to that person's salary. There is no

> salary premium for being a program director.
>
> Rather, the recognition of the additional responsibility comes through a reduction in teaching assignments.

(Tr. 11,781-783).

The Ethnic Studies Committee had offered a higher salary to Dr. Williams as Director of Ethnic Studies/assistant professor of history than it did to Dr. Holden as Director of Ethnic Studies/assistant professor of anthropology. Dean Baldwin explained this salary differential as follows:

> The salary figure I originally recommended for Clarence Williams caused some outrage on the part of the ethnic studies search people. They went to the provost and said, "There's no way he'll come for this. You've got to go not an extra mile but an extra five miles." And the --
>
> THE COURT: What did he do? What was he doing?

> THE WITNESS: He was completing a career in the Air Force where he had had substantial administrative experience, and finishing his doctoral studies in sociology. He did not yet have his degree.
>
> So pressure from senior faculty associated with ethnic studies caused Harry Alpert to increase the salary over -- beyond what I had originally recommended. He took the highest figure that he could reasonably justify based on salary scales determined nationally for ethnic studies; whereas, Madronna Holden's salary had been predicated on national salary information for anthropology.
>
> . . . The salary offer that we made was -- was rejected with some scorn as simply not what he was able to command in the marketplace.(

Tr. 11,874-875).

Apparently, the U of O had recruited Dr. Williams, a black Air Force officer, with a high salary offer. When he declined the offer, the U of O did not extend the same offer to Dr. Holden.

However, she did accept the offer that was extended to her -- a full-time joint appointment as Director of Ethnic Studies/ assistant professor of anthropology. Dr. Holden does not claim that Dr. Williams is a comparator for the purposes of her sex discrimination in salary claim, and she does not claim sex discrimination in hiring.

SALARY CLAIM

Dr. Holden claims that she should have been paid as much as Dr. George Mills, her predecessor, who died in August, 1975. The evidence reflects that Dr. Holden's salary in 1976 was lower than Dr. Mills' salary at the time of his death.

In order for the court to draw an inference of sex discrimination in salary, the court must first find that Dr. Holden was equally qualified with

Dr. Mills and that she performed substantially the same job as he performed.

Dr. Mills was hired on a twelve-month contract for the 1973-74 academic year to create, administer, and teach an ethnic studies program. Dean Baldwin explained the reasons for Dr. Mills' twelve-month contract:

> George had a substantial start-up challenge to face, and that was precisely the reason he was given an initial twelve-month contract. It's curious, and this is by way of an admission at the clumsiness of the university bureaucracy sometimes, in the faculty legislation calling for the appointment of an ethnic studies director, the faculty urged the appointment of that person on a twelve-month contract for the first year to allow a full summer for preparation for the initiation of the program. And such a contract was provided. And the following year, the budget office came through with another twelve-month contract rather than the nine-month

> contract that had been anticipated, a curious artifact, but there it was.

(Tr. 11,766). Dr. Holden was hired on a nine-month contract. Much of the difference in the salaries of Dr. Mills and Dr. Holden is explainable on the basis of the twelve-month and nine-month contracts for which they were hired.

Dr. Mills and Mr. Holden's jobs were also different. Dr. Mills organized the Ethnic Studies Program, and he also taught (with the assistance of graduate teaching fellows) the ethnic studies classes. Dr. Holden was the administrative head of the Ethnic Studies Program, who arranged for faculty to teach the classes. Her primary assignment was in the Department of Anthropology. Each discipline commands its own salary level. Her salary was based on the salaries of faculty in the

Department of Anthropology. Her salary was at the median of assistant professors in the Department of Anthropology and above the median of other assistant professors who were program directors at the U of O. Dr. Mills' salary was based on comparable salaries of Ethnic Studies faculty throughout the United States.

Dr. Mills and Dr. Holden's backgrounds and prior experiences were very different. Dr. Mills had received his Ph.D. degree three years before Dr. Holden. He had taught at Gonzaga University, Eastern Washington State College, the University of South Dakota, and Whitworth College. He had been the director of the Washington State Title III project for two years. He had served as the consultant for a desegregation workshop and for the Action Program at

Eastern Washington State College. He had directed a career opportunity program in Spokane for one year. He had been the main instructor for an Indian education program in South Dakota. He also had extensive experience as an educator of mentally retarded children and mentally handicapped adults. Dr. Mills was a Native American.

In short, Dr. Mills brought a different range and quality of experience to the position of Director of Ethnic Studies than did Dr. Holden. Because of the differences in the lengths of their contracts, their prior experiences and education, and the nature of their responsibilities, Dr. Mills is not an appropriate comparator for Dr. Holden. Dr. Holden cannot prevail on her claim that she should have been paid

the same salary as Dr. George Mills.

WORKLOAD

In support of her claim that she was discrininatorily overburdened in her position as Director of Ethnic Studies, Dr. Holden points to a series of incidents, each of which she claims is evidence of unusual and unfair treatment of her because of her sex.

Dr. Holden first complains that she was not given a job description for the position of Director of Ethnic Studies and therefore her job had no boundaries and was overwhelming. In response to this complaint, Dean Baldwin testified as follows:

> Q [By Mr. Lidz] Okay. Do you recall in that fall receiving a request from her for a job description?
>
> A I recall conversations with Madronna Holden at several

points throughout her tenure at Oregon expressing concern with the multiplicity of tasks she felt responsible to fulfill.

Job descriptions at the University are provided to classified personnel, or, more specifically, job descriptions come from Salem for the various classified personnel ranks.

Job descriptions are not provided to academic personnel. The obligations of academic employees of the University are spelled out in the University of Oregon Faculty Handbook. They are not a matter of individual specification. The character of the job she was recruited to undertake may be, I think, most accurately gleaned from looking at the job description provided in the search document. But there is no separate job description available for Madronna Holden's position or any other academic position.

. . .

A It's no surprise that many academics do feel from time to time enormously overworked and from time to time, terribly underpaid. That is a sense that comes upon various members of the teaching

faculty from time to time.

> There were occasions when Madronna Holden came to the office to talk about one problem or another when quite evidently she was feeling these -- these concerns. And I -- I surely reflected with her on these matters and tried to communicate to her that she wasn't alone. That is, all members of the faculty from time to time reach a point of frustration and sense of isolation and a sense of helplessness in the -- in recognizing the enormity of the task and 24 hours a day isn't enough.

(Tr. 11,793-795).

Neither Dr. Holden nor any other academic employee at the U of O received a job description.

Dr. Holden next complains that the Ethnic Studies Program had inadequate space and that Dean Baldwin was insensitive to the program's needs and reprimanded her for talking with a space analyst regarding the space problem. The

court finds that Dean Baldwin assisted Dr. Holden in obtaining more space for the Ethnic Studies Program. He testified as follows:

> Q [By Mr.Lidz] What is involved -- can you tell us what was involved in finding more space for the ethnic studies program?
>
> A Ethnic studies wanted more space and, understandably enough, they wanted space contiguous to the space they already had. So what was involved in this instance was finding alternative space for the people moved out so ethnic studies could have that space. That is, it wasn't vacant space. It was space used by other members of the academic community and we had a musical chairs kind of event to somehow work out, to find more space for the people who were displaced and so on. Several alterations.
>
> Q Did you find that space?
>
> A We did and additional space was provided to the ethnic studies program.
>
> Q To the best of your knowledge, did you ever

> reprimand Dr. Holden for telling the space analyst that ethnic studies had a real program and might grow in the future?
>
> A No. No. I certainly did not reprimand Dr. Holden.

(Tr. 11,798-799).

The court concludes that inadequate space posed a problem for the Ethnics Studies Program. Dr. Holden attempted to resolve the problem by dealing directly with a U of O space analyst rather than the Dean. Thereafter, Dean Baldwin was able to resolve the problem. If unpleasant words were exchanged between Dr. Holden and Dean Baldwin, it was not because of Dr. Holden's sex.

Dr. Holden next complains that a second faculty member was not hired for the Ethnic Studies Program in the summer of 1977 as promised, and therefore she

was overburdened with work. Dean Baldwin testified as follows:

> Q [By Mr. Lidz] Now, Dr. Baldwin, during the course of the 1976-77 year, was there a continuing search for a second position in ethnic studies?
>
> A There was a search, yes.
>
> Q Was an offer made to a top candidate?
>
> A An offer was made with some difficulty. By the time the search committee had completed their deliberations, our budget reduction for the following year had already been communicated. And the best we could do at that time was provide funds for half a position. We went a step further by working with the history department. The top candidate selected by the ethnic search committee was a historian. We worked with the history department, cajoled them, call it what you will, and finally gained their agreement to help support the position. They would have one extra course taught through history by the recruit and we were able to then offer a position at two-thirds time or a little better. .7 FTe. I've forgotten the details now, but

the job offer went out to a historian, a man named Gonzales, who was teaching at Santa Cruz while he was completing his dissertation. He came well recommended, did well in his interview on campus, and was extended the offer. He elected to remain in Santa Cruz and stay with the part-time teaching responsibility there rather than come to Eugene.

Q Was there a second candidate?

A Dr. Holden asked in August that another person [a woman] be appointed and I was unwilling to extend that appointment. The appointment at that time, without the participation of history in the budget, would have been only for half a position. That's all the money that we had. And I did not feel justified in recruiting to Eugene from Colorado a member of the faculty for a one-year appointment. It struck me as an inappropriate exercise. I might add that I refused to extend another appointment at this time for a position in biology under the same circumstances, that is, biology through putting together leave money and so forth, came up with funds for a full position.

> They wanted to extend the offer to a scientist from the University of Washington, but they had no money for the following year. And their hope was that somehow or another the money would materialize, that somehow after asking this person to move, that the funding would take care of itself, and in that case again, I said no, we can't do that, it's not a decent way to treat people.

(Tr. 11,804-806).

The court concludes that Dr. Baldwin's refusal to extend an offer to an out-of-state resident (a woman) to assume a temporary half-time position was reasonable and related to financial problems at the U of O rather than Dr. Holden's sex or the sex of the applicant.

Dr. Holden next complains that Dean Baldwin rejected her request for a courtesy appointment as a research associate for Waris Eishaq. Courtesy

appointments had been easily obtained until Dr. Paul Olum became the Provost. Because he felt that courtesy appointments had been abused in the past, Provost Olum would not approve courtesy appointments without an adequate explanation. Dean Baldwin testified that he requested a statement of reasons for the requested courtesy appointment and a copy of Mr.Eishaq's curriculum vita for Provost Olum. He received neither. Therefore, Mr. Eishaq did not receive the courtesy appointment. There is no evidence in the record that Mr.Eishaq's failure to receive a courtesy appointment was related in any way to Dr. Holden's sex.

Dr. Holden complains that, when she arrived at the U of O in 1976, she received a "peculiar" budget change form, showing a reduction in the Ethnic Studies

budget of $4298. She claims this budget cut was somehow related to her sex. In fact, this was a routine budget change form which reflected a decision which had been made in the spring of 1976 to reduce the number of graduate teaching assistants assigned to the Ethnic Studies Program from four to three. Dr. Holden was not consulted about the change because she had not been hired when the change was authorized. The Ethnic Studies Committee and Dean Baldwin made the decision to reduce the number of graduate teaching assistants based upon budgetary needs, and this decision was in no way related to Dr. Holden.

Dr. Holden complains that Dean Baldwin treated her in a patronizing manner. Dr. Holden testified that when she met with Dean Baldwin and asked him to provide funds for a second faculty

member for the Ethnic Studies Program, Dean Baldwin patted her hand and said, "Madronna, Madronna, we all have our little problems." Dr. Holden testified that she never saw Dean Baldwin pat the hand of a male administrator.

Dr. Holden also testified that on another occasion Dean Baldwin told her she was lucky he had protected her program to the extent that he had and that that was all she should hope for. Dean Baldwin denied making any patronizing statements to Dr. Holden and explained that Dr. Holden's treatment was no worse than the treatment of other faculty during a time of financial distress. Dean Baldwin was a credible witness.[2]

Dr. Holden next claims she was overburdened in her teaching responsibilities. Actually, Dr. Holden

received more release time from her teaching duties in the Department of Anthropology than most program directors. Dr. Holden taught three courses during her first year as Ethnic Studies Director rather than the five courses that program directors ordinarily teach. In her second and third years as director, she taught four courses. Since the typical amount of release time for a program director is only one course, her workload was actually less than other program directors. In addition, Dr. Holden had a half-time secretary, which was more secretarial support than any other program director in the College of Arts and Sciences received, and the services and supplies budget for the Ethnic Studies Program, adjusted for the size of the program, was the highest in the College. The court therefore finds that

Dr. Holden's claim of sex discrimination with regard to her workload and lack of administrative support are without merit.

Dr. Holden's three year contract as Director of Ethnic Studies expired with the 1978-79 academic year. Thereafter she was a full-time assistant professor of anthropology for one year. Dr. Holden made no complaint in this suit with regard to the ultimate termination of her contract in 1980.[3]

COURT'S CONCLUSION

With respect to the quality of Dr. Holden's performance as Director of Ethnic Studies, Dean Baldwin testified as follows:

> Q [By Mr. Lidz] Turning to Dr. Holden's performance as a faculty member and program director over the three years in which she served as ethnic studies director,can you

comment on her performance as director of ethnic studies?

A One has to respond to that question in three sub-responses. As an administrator of the ethnic studies program, her performance was below that of other program directors. That is, she seemed to have difficulty with many of the routine administrative tasks of the post, as well as with more generalized functions in long-range planning and program definition.

As a teacher, she did a very commendable job in courses relating to field methods and folklore. There were some dissatisfactions with her relative inaccessibility outside of scheduled classes.

Although she had an office with the other anthropology offices, in addition to her ethnic studies office, students could not reach her at that office. That is, she was very rarely there and did not attend departmental faculty meetings and colloquia.

Her scholarly life over her period of tenure as director of ethnic studies simply did not materialize. There were no publications stemming from that period.

(Tr. 11,817-818).

Dr. Holden was not a particularly good administrator. In addition, she assumed the position of Director of Ethnic Studies at a difficult time. When she became director there was committee leadership -- the prior director had died a year earlier. Also, she attempted to change the direction of the program in order to make it more "academic." From the evidence, it appears that many students and townspeople wanted the program to be a support group for minority students. Then she was immediately confronted with legislatively mandated budget cuts that made her job even more difficult. No doubt, Dr. Holden had problems, but she has not proved to this court that any of them stemmed from being a woman. They stemmed

from the demands of the position, the financial exigencies of the times, and her own limitations as an administrator.

Dr. Holden cannot prevail on her individual claims.

Dr. Madrona Holden Footnotes

1. At the time he was offered the position, Dr. Williams was just completing his Ph.D. degree.

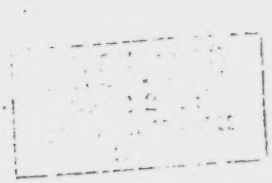
2. Dr. Deanna Robinson, a class witness and a U of O faculty member who worked as an administrative intern for Dean Baldwin, testified that she considered Dean Baldwin to be a "role model" for herself and that he treated her "very, very well."

3. Plaintiffs' Proposed Findings of Fact 24 and 27 read as follows:

> 24. Dr. Holden received a letter from Dr. Paul Olum, then Acting President of the university, stating that she would not be allowed to go through grievance procedures at the university as long as she was involved in the court suit.
>
> . . .
>
> 27. Dr. Holden was discriminated against on the basis of her sex in that she was denied access to the grievance procedures due to her participation in this lawsuit.

A copy of the letter of Dr. Olum, Defendant's Ex. 3772P, mentioned in Plaintiffs' Proposed Findings of Fact 24 follows this page. The court has very little evidence on this issue. If Dr. Holden has a grievance that is not

resolved by this court's ruling, the court assumes that the grievance procedures at the U of O are still available to Dr. Holden.



Office of the Vice President
for Academic Affairs and Provost
UNIVERSITY OF OREGON
Eugene, Oregon 97403

503/686-3031

July 3, 1980

File - 001
020

Madronna Holden
3470 Potter Street
Eugene, OR 97405

Dear Madronna:

I am writing in response to your request to initiate University grievance procedures on your behalf.

Because the issues raised in your June 11 letter appeared to coincide with the issues implicated in the class action complaint in which you are a plaintiff against the Oregon State Board of Higher Education, I sought legal advice before reaching a decision about your request. The Chief Counsel for the State System of Higher Education advised me that because you have chosen a more comprehensive forum in which to assert your claim, i.e. the U. S. District Court, it would be inappropriate to engage in a parallel process of University grievance procedures at this time. Although, as a consequence, we will hold your grievance in abeyance for the present, I assure you that we will be prepared to proceed with it, if you wish to do so, after the class action complaint has been resolved.

Cordially,

Paul Olum
Acting President

PO:KN

an equal opportunity/affirmative action employer

DEFENDANT'S EXHIBIT 3772 P

LOIS SCHREINER

Lois Schreiner, a retired documents librarian at the University of Oregon (U of O) library, claims that she was discriminated against because of her sex in that (1) she did not receive a pay raise when she served as acting head of the documents section; (2) she was not appointed to the combined position of head of the documents section/assistant head of the reference department in the library; and (3) even though she did not receive the appointment, she should have been paid the same as the person who received the appointment because she was equally qualified with him and performed substantially the same work as he performed. Ms. Schreiner filed a charge of sex discrimination with the Equal Employment Opportunity Commission and

received a Right to Sue Letter on November 10, 1980.

Ms. Schreiner received a B.S. degree in geography from the U of O in 1968, and a Master of Library Science degree from the U of O in 1969. From July, 1958, until she received her Masters degree, she was a classified employee at the U of O library working as a secretary to the head of the serials section (1 year); as a library assistant in the government documents section (10 years); and as a library assistant in the general reference division (1 term).

FIRST SALARY CLAIM

On January 1, 1970, Ms. Schreiner became an academic employee, an instructor. She worked part time in the documents section and part time in the general reference department until September, 1973, when she became employed

full time in documents. In July, 1975, she was promoted to assistant professor and granted tenure. She also served as acting head of the documents section during the summer of 1975 and from October 1, 1976, to January 1, 1977. She served as head of the documents section from January 1, 1977, until October, 1977. Thereafter, she was transferred to the social science section for 5 1/2 months and then back to documents.

Her first claim of sex discrimination stems from the fact that her salary was not increased when she became acting head and later head of the documents section. Ms. Schreiner testified as follows on this issue:

> Q [By Mr. Willner] In the fall of 1977 did you have a conversation with Dr. Bill Axford, the head of the

library, concerning your compensation?

A Yes.

Q What was that conversation?

A In late September I went to Dr. Axford and asked him if I couldn't have a raise because of my additional responsibilities as head of the documents section.

Q All right, and what was Dr. Axford's response, both in words and action?

A Dr. Axford said that the documents section would no longer be autonomous; that he would put it under the umbrella of social science and that Holway Jones would be the head of documents, and I would no longer be the head of documents.

Q And I take it you got no raise?

A And I got no raise, true.

(Tr. 4110).

In response to this claim, Donald Smith, assistant university librarian for budgeting and planning, and former

acting university librarian, testified as follows:

> Q [By Mr. Lidz] Do you recall a time in 1976 and 1977 when Mr. Axford -- well, who was Mr. Axford, by the way?
>
> A Mr. Axford was the university librarian from 1973 to '79.
>
> Q And do you recall a time in 1976 and 1977 when Mr. Axford appointed Lois Schreiner, first as acting head of the documents section and then as head of the documents section?
>
> A Yes.
>
> Q Do you recall if she received a salary increase for assuming those responsibilities?
>
> A No, she did not.
>
> Q Do you know why not?
>
> A Well, it's not the custom to give salary increases for such appointments. The salaries are based on your academic rank for most positions from instructor through professor.
>
> Q Would anybody else have received, then, an additional salary or a salary increase for

assuming additional responsibilities ----

A No

Q -- promotions in rank?

A Not at that time.

(Tr. 12,231-233)

Mr. Smith's testimony is not rebutted. Ms. Schreiner's administrative duties were not extraordinary. Within the academic community it is not unusual for faculty members to perform administrative duties without additional compensation. Whether or not this employment practice is a good employment practice is not the issue before the court. The only issue is whether this practice was applied in a discriminating manner against Ms. Schreiner. There is no evidence that it was.

ADMINISTRATIVE CLAIM

In 1979, Mr. Smith, who was then acting university librarian, appointed Ms. Schreiner to serve on a search committee for the combined position of head of the documents section/assistant head of the reference department. Before accepting an appointment as a search committee member, Ms. Schreiner told Mr. Smith that she was considering applying for the position her self. He told her that if she did apply, he would not recommend her. Ms. Schreiner testified as follows:

> Q [By Mr. Willner] Ms. Schreiner, when there first was discussion of instituting a search for the position of head of documents, did you talk to Mr. Smith, the acting head librarian, about your applying for the position?
>
> A Yes.
>
> Q And what did you understand the duties of the posi tion were that was to be advertised?

A Similar to what I had been doing as head of documents.

...

Q What did Mr. Smith tell you about whether you could apply for the position?

A When I asked if I could apply for the position rather than staying where I was, I asked him if I could apply, and he said, "Yes, but you won't get the job, because you have not been to school anywhere else but the University of Oregon and you have not worked anywhere else but the University of Oregon."

Q Do you know any other person who was given similar information by Dr. Smith?

A No, I do not.

(Tr. 4113-4114).

Thereafter, Ms. Schreiner decided not to apply for the position and served on the search committee, which selected Tom Stave for the position.[1]

In response to her contentions, Mr. Smith testified as follows:

Q [By Mr. Lidz] Do you recall discussing the search for a new head of documents with Lois Schreiner in 1979?

A Yes.

Q And is that the position for which Tom Stave eventually was hired?

A Yes.

Q Can you describe the discussion that you had with Ms. Schreiner concerning her interest in the position?

A Yes, she was a member -- I appointed her as member of the search committee to -- for that position as the head of the documents section and assistant head of the reference department.

And she came to me to ask what I thought her -- she was interested in applying for that position, and she asked me what I thought her chances were of securing appointment since I had explained to her that she had to choose between either being on the search committee or being an applicant -- a candidate for the position.

And I said, well, I really couldn't tell her what it would be until the committee had even

met to consider. And she said she wanted a more definitive answer than that. She wanted to know what I would suggest, what I would recommend.

And I said I would not recommend her appointment for several reasons. One, that she did not have the administrative experience or ability, she did not have the experience in other libraries. Her only employment has been in the University of Oregon library as a librarian. I felt that her preparation for that position was inadequate.

Q And at that time had you already observed her performance as acting head and head of documents ----

A Yes.

Q -- in 1976 and '77?

A Yes.

Q Can you compare her performance in that position with Tom Stave's later performance in that position?
A Can I compare them?

Q Yes.

A Yes, I think I can give some comparison.

> Stave brought to the position experience from employment in the Library of Congress, for example, and knew much more about -- about documents themselves, federal government documents. And as such, in a -- serving as a reference librarian, was able to serve far better than Lois served as a reference librarian.
>
> And as far as administrative ability is concerned, Tom Stave has a pleasant personality and seeks to get along with everyone and manages everything very smoothly, while Lois Schreiner, on the other hand, has a very frank presentation, outspoken, honest, somewhat abrasive as a result.
>
> Secondly, in general performance, Stave is cooperative, follows instructions, while Schreiner tends to be at times insubordinate or at least at that time.

(Tr. 12,233-235).

Mr. Smith's reasons for saying he would not recommend Ms. Schreiner for the administrative position do not appear to be gender related. The U of O is one

of the major research institutions in the State of Oregon. Academic "in-breeding" -- that is, a practice whereby faculty who receive their degrees from an institution remain at that institution without studying or teaching elsewhere -- is ordinarily discouraged. These "in-bred" people often do not progress or do not progress rapidly up the academic ladder or receive administrative positions. However, the court will review the faculty evaluation ratings that Ms. Schreiner received during her tenure as an academic employee, and will also review how other women have been treated by the U of O library administrators in order to determine whether Smith's explanation is merely a pretext for sex discrimination.

Ms. Schreiner and other faculty librarians are evaluated on the quality

of their professional services, their professional growth, leadership in academic and administrative service, and service to the larger community. This evaluation is on a five point scale, with five being low and one being high. Out of the 45 library faculty who are reviewed every year, only four or five have received ratings below three. Ms. Schreiner has been rated at three in many of her supervisory performance and attitude evaluations. See Ex.3776(e). Her supervisors have had to urge her to participate in activities which would broaden her horizons. She was criticized for having a "civil servant" mentality -- that is, she expected to work a 40-hour week and be given salary increases based on length of service and responsibilities undertaken. In the academic community, faculty members are expected to give the

time necessary to complete the job for the amount of pay given; salary increases are to be based primarily on merit and small across-the-board increases. She preferred to work on the detailed technical aspects of her job rather than the administrative, people-oriented aspects. Clearly, Ms. Schreiner was a marginal faculty member in the areas of leadership and supervisory ability, the very attributes that were necessary for the administrative position at the U of O library.

Other women at the U of O library have received administrative appointments. For example, Patricia Silvernail, head of the Public Service Division; Isabel Sterling, head of the science library; Alice Allen, head of the catalog department; Katherine Eaton, head of the bureau of governmental

research; Virginia Parr, head of the educational psychology section; Elaine Kemp, acting assistant librarian for technical services.

The court concludes that sex discrimination was not the basis for Mr. Smith's statement to Ms. Schreiner that he would not recommend her for the administrative position she sought.

SECOND SALARY CLAIM

Lastly, Ms. Schreiner complains that she should be paid the same as Tom Stave, who was hired as the head of documents/assistant head of the reference department by the committee on which she served. Ms. Schreiner testified that when Mr. Stave assumed the position as head of documents/assistant head of the reference department, his duties were essentially the same as she had performed, except that he was not

responsible for foreign and international publications as she had been, and he did not supervise as many students as she had supervised. He also received nearly $3,000 more salary than she received.

The Board first argues that Ms. Schreiner's salary reflects the fact that she has been a mediocre employee and since academic salaries are primarily based on merit, her salary is necessarily low. Second, the Board argues that Mr. Stave is an inappropriate comparator for Ms. Schneider because of differences between their prior experiences and present responsibilities.

The court will first address the issue of Ms. Schreiner's "merit" as a librarian as it relates to her pay. Ms. Schreiner has had several major

impediments in her career aspirations at the U of O library. First, she received her B.A. and M.A. degrees from the U of O and she has done very little work or study away from this institution. University Librarian George Shipman explained why this is a career handicap for a librarian:

> Q [By Mr. Lidz] Mr. Shipman, is there some premium or value placed on experience at other libraries for a librarian?
>
> A There is for me for this library and most academic libraries.
>
> Q Why is that?
>
> A Well, the primary reason is that when an institution -- when a University library does not have movement, that is, from one institution into this library or from a number of institutions into this library, we tend not to be aware of natural developments and, more importantly, specific successful and perhaps unsuccessful programs being pursued at other institutions.

> The -- the fact is, in my feeling, that the library can become very stultified if we are not aware of developments in other institutions.

(Tr. 12,197-198).

Second, Ms. Schreiner did not make up for this career disadvantage by being active in librarianship outside of the State of Oregon.

> [Mr. Shipman's answer to question by Mr. Lidz] Lois seemed to be adequate at meeting the daily needs of her job, but she did not seem materially interested in -- in librarianship at the national level. She hadn't participated actively in the major associations of the country.

(Tr. 12,201).

Another factor that impeded Ms. Schreiner's career at a major research institution library like the U of O library is that she did not have a second master's degree. While Ms. Schreiner has a master's degree in

library science, she should also have had a masters degree in some subject matter area such as English literature, European history, or psychology in order to be of the greatest help to the academics who use the library.

Mr. Shipman summarized his opinion of Ms. Schreiner's performance as follows:

> Q [By Mr. Lidz] Mr. Shipman, this may be a difficult question, but if you can answer it, I'd appreciate it: Overall, how would you compare Ms. Schreiner's performance as an assistant professor with that of other assistant professors in the library?
>
> A Somewhere between marginal and adequate.

(Tr. 12,214).

Perhaps more important than Ms. Schreiner's lack of credentials upon her "merit" as a librarian and therefore upon her pay is her abrasive personality and

EDITOR'S NOTE

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87-195

Supreme Court, U.S.
FILED
JUL 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ANNA PENK, ET AL, Petitioner,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DON S. WILLNER
Willner & Kelly
111 S.W. Front, Suite 303
Portland, Oregon 97204
(503) 220-0328
Counsel of Record

July 28, 1987

VOLUME III

her inability to work well within the library. As the comments in the annual review of 1969-70 indicate, personality problems were evident even then:

> She is often too concerned with trivial things and tends to be too easily excited and sharp in speaking to a subordinate. She realizes her problem and has made real efforts to improve. (Ex. 3776(e)).

The annual review of 1971 contains these comments:

> Ms. Schreiner's weakness is in her relationships with others. She is impatient and quite explosive. Though she gets over her anger quickly, others may stay offended at her for a long while as a result of sharp words. I believe that her relationships with the public are good. (Ex. 3776(e)).

In March, 1976, then - University Librarian H. William Axford wrote in his review that Ms. Schreiner

> . . . has not, to date demonstrated the potential to develop those [attitudes] necessary for a minimally

acceptable performance on an AAU university library faculty. (Ex. 3776(e)).

The annual review of 1978 contains these comments by Holway Jones, her supervisor:

> I find Lois Schreiner somewhat of an enigma. I suspect some of her attitudes arise in deep scars long borne from a personal past. She has had to fight for position in this world. She continues to fight for what she sees as her rightful place professionally. . . . (Ex. 3776(e))

In 1979 Holway Jones wrote in part:

> The fact of the matter is, Lois, that your own perception of your value is probably higher than most others around you. If this is a "come-down," you will have to live with that. You have many fine qualities as a librarian and as a person, but I am not always confident in your judgment. (The recent decision about storing some USSD pamphlets in vertical files is an example.) Your often literal interpretation of rules and regulations often disturbs me, as well as your failure to see the big picture, the overview,

which is, in my judgment, so essential . . .[2] (Ex. 3776(e)).

In the academic world, where across-the-board percentage increases and merit pay determine one's salary, it is reasonable that Ms. Schreiner, with the kind of reviews that she received, would have a lower salary than most of the assistant professors in the U of O library. Even with these reviews, however, she received "equity" pay increases in 1979 and 1980. She took an early retirement, effective January 1, 1983.

The court concludes that Ms. Schreiner's failure to advance in salary to her satisfaction and expectation is due to her generally average performance and to her abrasive personality and not to sex discrimination.

Lastly, Ms. Schreiner asks the court to find that Mr. Stave is an appropriate comparator with her and to find that she was entitled to be paid the same as he was paid when he was hired in 1979.

While Mr. Stave performed tasks substantially similar to Ms. Schreiner when he was working within the library, he had different responsibilities than she had. He had personnel responsibilities and he was held accountable as the head of that area of the library. He received his degrees away from the U of O. He also worked for the Library of Congress for six years so that he brought with him experiences which Ms. Schreiner did not have. The court concludes that Mr. Stave is not an appropriate comparator for Ms. Schreiner and that his higher salary was not based on sex discrimination but was based on

his prior experiences and the responsibilities that he had within the library that Ms. Schreiner did not have.

Ms. Schreiner cannot prevail on her individual claim.

Schreiner Footnotes

1. Since Ms. Schreiner did not apply for the position, no one will ever know whether she would or would not have been selected for the position by the search committee.

2. The court does not intend to imply that the entirety of Ms. Schreiner's evaluations are negative. Ms. Schreiner was lauded for her attention to detail, her work in document pro cessing, and her courtesy to patrons. The court has noted only the consistency of negative evaluations among several evaluators which leads the court to find that Ms. Schreiner was overall an average librarian whose ability to work harmoniously with her colleagues was limited. Her salary reflects this status.

DR. RUTH WAUGH

Dr. Ruth Waugh, an associate professor of education at the University of Oregon (U of O), claims that she was discriminated against because of her sex in that (1) she was paid less than equally qualified men who were performing substantially the same jobs as she performed; and (2) she was assigned practical supervision courses, which are more burdensome and have less status than regular teaching positions and which take so much time that the writing and research necessary for professional advancement cannot be done. Dr. Waugh intervened in this action as a named plaintiff without filing a charge of discrimination with the Equal Employment Opportunity Commission.

Dr. Waugh received a B.A. degree in education from Southern Oregon State

College in 1957; an M.S. degree in special education from the University of Oregon in 1963; and a Ph.D. degree in special education from the University of Oregon in 1971. Before she came to the U of O, Dr. Waugh had been an elementary school teacher for nine years.

Dr. Waugh was recruited by the U of O School of Education in 1963 to be the administrative head of the DeBusk Memorial Center, a laboratory-type, special education school in the College of Education. In addition to her administrative responsibilities, Dr. Waugh also taught and supervised U of O students who in turn diagnosed, counseled, and taught children who came to the DeBusk Memorial Center seeking special education services. Dr. Waugh held this position with the DeBusk Memorial Center until 1973. From 1973

until the present, Dr. Waugh has been a regular teaching faculty member and most recently, the acting chair of the area of special education. In 1982, Dr. Waugh entered into a tenure reduction agreement with the UofO which provides that in exchange for an extraordinary salary increase she will retire no later than June 15, 1985. Dr. Waugh has no complaint regarding the conditions of her retirement.

Dr. Waugh was in the rank of instructor from 1963 to 1966. In 1966, she was promoted to the rank of senior instructor and granted tenure. In 1971, when she completed her Ph.D. degree, she was promoted to the rank of assistant professor. In 1974, she became an associate professor. Dr. Waugh has never applied for a promotion to the rank of

full professor. She has no complaint regarding her rank status.

Dr. Waugh has been very active in committee work in the College of Education and throughout the University. She has served, for example, on the prestigious Faculty Personnel Committee, which is comprised of eight members elected by the entire U of O faculty, and on the Advisory Council of the College of Education, an elected position in her own discipline. Dr. Waugh has published at least fourteen articles in refereed journals and has written many other professional papers. Her teaching skills are rated above average. During the 1972-73 academic year, she studied on a post-doctoral fellowship in Yugoslavia. During the summer of 1973, she returned to Yugoslavia, taking with her students from

the UofO who she felt would benefit from the foreign study. During the summer of 1974, she taught at the University of British Columbia.

Dr. Waugh is an excellent faculty member. Dr. Robert Gilberts, who has been Dean of the College of Education since 1970 testified as follows:

> Q [By Mr. Lidz] Would you tell me -- describe to the court overall how you evaluate Dr. Waugh's performance as a faculty member at the University of Oregon?
>
> A I consider her to be one of our outstanding faculty members on any count. She has been a major contributor in all of her positions all the way through and is currently -- I hate to use the word going out, but sort of going with a blaze of glory, having gotten a number of new grants, training grants, and clearly she is -- she is first class.

(Tr. 11,927).

SALARY CLAIM

Dr. Waugh contends that she has been paid a lower salary than three equally qualified men who perform substantially the same job as she performs in the College of Education. The men are James Booth, Dr. Knute Espeseth, and Dr. George Sheperd.

The salary histories of Dr. Waugh and her comparators from 1977 through 1983 are as follows:

NAME	1977	1978	1979	1980	1981	1982	1983
Waugh	$18,673	$20,175	$20,175	$22,188	$24,225	$26,963*	$30,238*
Booth	19,031	20,883	20,883	22,960	25,068	***	-0-
Espeseth	21,814	23,480	23,480	25,241	27,558	27,558	30,241
Sheperd	22,063	23,986	23,986	25,785	28,153	28,153	30,850

* Includes 6% increase for relinquishing tenure as part of early retirement contract.
** Includes a 5.3% increase for relinquishing tenure as part of early retirement contract.
*** Died of a heart attack.
(See, Pl. Ex. 900).

Factors which can be quantified and which are known to affect salary levels include length of service to the institution; department or discipline; degrees earned and the years they were received; and rank. These factors and the years of birth of Dr. Waugh and her comparators are as follows:

Exhibit

NAME	DATE OF BIRTH	DEPT.	YEAR OF SERVICE	DEGREE/ YEAR	RANK/ YEAR
Waugh	1920	Div. of Teacher Education	1963	Ph.D. 1971	Assoc. Professor 1974
Booth	1921	Div. of Counseling	1962	M.A. 1956	Instructor 1970
Espeseth	1932	Div. of Teacher Education	1965	Ph.D. 1965	Assoc. Professor 1969
Sheperd	1933	Div. of Teacher Education	1966	Ph.D. 1965	Professor 1977

Factors which are difficult to quantify but which affect salary levels are quality of performance; publications; and departmental, campus, and public service. Beginning salary is also a very important consideration because of the across-the-board percentages of salary increases given by the Board.

Since Dr. Waugh has earned less than each of her comparators throughout her career, the court must first determine whether Dr. Waugh's comparators perform substantially the same job as Dr. Waugh.

JAMES BOOTH

Mr. Booth (now deceased) and Dr. Waugh were both hired as instructors, he in 1962 and she in 1963. Both had M.A. degrees. His area within the School of Education was counseling and educational psychology; her area is special education. Both were promoted to the

rank of senior instructor in the mid-1960's. Dr. Waugh obtained a Ph.D. degree in 1971 and, thereafter, acquired the ranks of assistant professor and associate professor. Mr. Booth never obtained a terminal degree, and he had remained at the rank of senior instructor throughout his career at the UofO. Mr. Booth had not done scholarly research because his position as senior instructor did not require him to do so. Dr. Waugh has published extensively because her positions as assistant professor and then associate professor require her to do so. Mr. Booth had not been actively involved in faculty governance. Dr. Waugh has been extensively involved in faculty governance, both within the School of Education and the overall University. Mr. Booth had been active as a consultant to community, social

service organizations and was a valued faculty member.

Dr. Waugh has better academic credentials than Mr. Booth. Academic credentials, however, are unimportant if job content differs. Since there is no direct evidence before this court of sex discrimination against Dr. Waugh, Dr. Waugh must show that she and Mr. Booth performed substantially the same work for this court to infer sex discrimination from the differences in their salaries. Spaulding v. University of Washington, 740 F.2d 686, 700 (9th Cir. 1984).

Dr. Waugh and Mr. Booth came to the UofO School of Education from different educational disciplines: she from elementary school education; he from vocational and occupational rehabilitation and education. Dr. Waugh

became a member of the Division of Teacher Education in the School of Education. Mr. Booth became a member of the Division of Counseling and Educational Psychology in the School of Education. From 1963 until 1974, Dr. Waugh was the director of the DeBusk Memorial Center and a full-time teacher in special education. During approximately this same period of time, Mr. Booth was developing a program for selecting, training, and placing VISTA volunteers throughout the United States. He also spent a year or two designing and participating in the training of indigenous people such as the Pit River Indians in California. For at least two terms during this time period he served in the School of Community Service and Public Affairs rather than the School of Education.

Dr. Waugh was asked on direct examination about Mr. Booth's job content.

Q [By Mr. Willner] What were Mr. Booth's duties during that period of time?

A From 1962 and 1963, he taught one course, practicum in rehabilitation. So his responsibilities were to supervise practicum, and for six years he worked with VISTA, to train VISTA volunteers. Then for a year he worked at the Community Service and Public Affairs Department and worked the rest of the time counseling faculty members, according to the information I obtained from the University catalog and from his vita.

Q Did a period of time come when he became director or coordinator of the DeBusk Memorial Center?

A Yes, in 1978, he lists that.

Q And was that 15 years after you had that responsibility?

A Yes.

Q Did Mr. Booth ever have teaching responsibilities?

A He taught one course the first two years that he was there. Then when he worked in VISTA he lists his responsibilities as program coordinator. So my assumption is that that involved some teaching of the VISTA trainees, and then he taught introduction to counseling; he also taught supervised practicum and that is considered a course.

Q Was he teaching University of Oregon students?

A During the VISTA years, no. They were volunteers who came to the University for training. VISTA was somewhat tangential to the administration of the University, it was one of the War on Poverty efforts.

Q Were the students that you were teaching and supervising University of Oregon students getting their degrees?

A Getting primarily Masters Degrees and Doctors Degrees.

(Tr. 2,046-047).

On cross examination Dr. Waugh testified as follows:

Q [By Mr. Lidz] What department was Mr. Booth in?

A In the counseling department within the college of education.

Q That's a different department or division depending upon the organization than you've been in?

A Yes, that's right.

Q You've never been in the counseling division or department?

A That's correct.

Q You mentioned that Mr. Booth was the program coordinator for the VISTA program; is that correct?

A That's what he had on his vita, yes, and in the university catalog that's also listed there.

Q And do you know what he did in that position?

A I imagine he was the program coordinator who had some responsibilities for the training.

Q He would be responsible for training students?

A Training the VISTA volunteers who were receiving

training at the University of Oregon.

Q And what would they -- what were they being trained to do?

A They were being trained to go out into poverty areas in the United States and perform a variety of activities to help individuals raise themselves out of their poverty level.

Q Do you know how the VISTA training program came to be associated with the University of Oregon?

A It was federal money obviously and a grant was written to obtain the money.

Q Was it a federal grant that paid his salary during those years?

A Yes, I believe so.

Q Do you know how large the grant was?

A I don't know the size of the grant. The people who came for training have stipends, I believe, but I don't know the size of the grant, no.

Q Do you know how many people were trained?

A I do not.

Q You mentioned also that Mr. Booth had an appointment in the School of Community Service and Public Affairs in 1972?

A That's correct.

Q You have not had an appointment in that school or college, have you?

A No.

Q And that school or college is completely distinct from the College of Education, is it not?

A Yes, it is.

Q It's not a subdivision of the College of Education?

A No. It no longer exists.

Q And can you tell me anything more about Mr. Booth's duties as VISTA coordinator?

A No, I cannot. For three years he's listed as program coordinator and for three years he's listed as evaluation coordinator.

Q You're answering off his vita; is that correct?

A Yes, that's correct.

Q Not of your own personal knowledge?

A Right.

Q During the time that he was director of the VISTA training program or coordinator of the VISTA training program, you didn't have any responsibility for the VISTA training program, did you?

A No.

Q So there was really no comparability in your duties during this period of time, was there?

A No. The students were not university students.

Q You weren't teaching the same students; you weren't in the same program?

A Right.

Q He was on soft money; you were on hard money?

A Right.

Q He was administering a grant?

A He was the program coordinator, evaluation officer. Ray Lowe is listed as the administrator or director

of the grant throughout the entire time it was listed at the campus.

Q You have never been in the same department as Mr. Booth in all the years you've been at the University of Oregon?

A No, I'm not a counseling person.

(Tr. 2,122-125).

During the time Mr. Booth was coordinator of the VISTA training program and assigned to the School of Community Service and Public Affairs, he was not an appropriate salary comparator for Dr. Waugh. Dr. Waugh's students were UofO students; Mr. Booth's were not. Dr. Waugh's salary was funded by the UofO and subject to that institution's budget; Mr. Booth's salary was funded by federal grant moneys. Most importantly, their jobs were different.

From 1978 until his death in 1982, Mr. Booth was Director of the DeBusk

Memorial Center. This is the same position that Dr. Waugh held from 1963 to 1973. In addition to being Director of the DeBusk Memorial Center, Mr. Booth taught in the Division of Counseling and Psychology within the College of Education. Mr. Booth taught such classes as Marriage Counseling; Ethical, Legal and Moral Issues in Counseling; Medical Aspects of Disability; Cross-Cultural Aspects of Counseling; and Disability and Mental Health.

From 1978 until 1982, Dr. Waugh was a regular teaching faculty member in the Division of Teacher Education within the College of Education. She was heavily involved in grant-funded research and writing as well as teaching. This court cannot say that the positions of Dr. Waugh and Mr. Booth were substantially the same from 1978 to 1982. Nor can the

court determine that their backgrounds and prior experiences were so similar that they should have been paid equally during those years. It may be that Dr. Waugh "should" have been paid more than Mr. Booth. Decisions about salary allocations, however, rest with the College of Education unless sex discrimination is involved.

There is no direct evidence of sex discrimination against Dr. Waugh. She was actively recruited by the College of Education; she has been voted and appointed to positions of leadership in the College; she has received substantial merit and equity increases; her work has been praised by administrators within the College.

The testimony of Dr. Fay Haisley, associate dean for the Division of Teacher Education, suggests that the

likely cause of the differences in the salaries of Dr. Waugh and Mr. Booth between 1978-1982 is that Dr. Waugh was in the Division of Teacher Education and Dr. Booth was in the Division of Counseling and Psychology. Dr. Haisley testified as follows:

> Q [By Mr. Willner] . . . [H]ow does the salary of teachers in the Teacher Education Division compare with teachers in other divisions?
>
> A I don't have data on that, but my best guess would be that it's generally lower.
>
> . . .
>
> Q Well, Dean Haisley, do you have any basis for such an opinion other than a guess? The word guess is not a word -- you can't guess in court.
>
> Do you have any additional basis for that or based upon your reading literature and your knowledge and your consulting work?
>
> A My knowledge would be that, yes.

> Q And what would your knowledge be?
>
> A My knowledge would be that faculty members who teach in colleges of education that deal with the preparation of pre-service teachers are paid a lower salary.

(Tr. 2210).

Concerning her own salary, Dr. Haisley further testified that as Associate Dean for the Division of Teacher Education her salary was lower than the salaries of the associate deans for the Division of Educational Policy and Management; the Division of Counseling and Educational Psychology; and the Division of Special Education and Rehabilitation. Dr. Haisley claims that the reason her salary is lower than the other three associate deans -- all men -- is that the Division of Teacher Education trains public school teachers and "about 70 to 80 percent [of public

school teachers are] female." (Tr.2191). Dr. Haisley claims that her salary and Dr. Waugh's salary are low because 75 to 80% of the students in the Division of Teacher Education are female, while the students in at least some of the other Divisions are predominantly male. Dr. Haisley does not contend, however, that the positions require substantially the same skills, effort, and responsibility. Without evidence of job con tents, these are comparable worth complaints, which are foreclosed by the Spaulding case and the court's order of August 10, 1984.

Dr. Waugh has the burden of proving that her position and Mr. Booth's position are substantially equal. She has failed to do that. Therefore, Mr. Booth is not an appropriate salary comparator for Dr. Waugh.

DR. SHEPERD

Dr. George Sheperd received a B.A. degree in English in 1955 and an M.A. degree in special education in 1958, both from Colorado State College. He received an Ed.D. degree in special education from the University of Illinois in 1965. (Dr. Waugh received a Ph.D. degree in 1971.) Dr. Sheperd came to the UofO College of Education as an assistant professor of education in 1965. (At that time Dr. Waugh had been there two years as an instructor.) In 1968 Dr. Sheperd became an associate professor. (Dr. Waugh was a senior instructor and became an assistant professor in 1971.) In 1974 Dr. Sheperd became a full professor. (Dr. Waugh became an associate professor in 1974 and has never become a full professor.)

Dr. Sheperd's special interest and expertise is in talented and gifted

education. He is the head of the Talented and Gifted Program, which he was instrumental in developing. Dean Gilberts, Dean of the College of Education, testified that Dr. Sheperd's research and scholarship are about equal to Dr. Waugh, and he has been active in departmental and University affairs, although perhaps not as active as Dr. Waugh.

Dr. Sheperd's starting salary in the 1965-66 academic year as an assistant professor with a terminal degree was $9,000. (Dr. Waugh, who had no terminal degree and was an instructor, had a salary of $7,000 in 1965-66.) Dr. Gilberts explained the differences between the salaries of Dr. Waugh and Dr. Sheperd as follows:

> George's [Dr. Sheperd] background in terms of experience in the public

schools is more or less equivalent to Dr. Waugh's, but he had the advantage of a six- year start and one promotion before Ruth began in the rank of assistant professor. His early years were really quite productive in terms of publications.

Ruth's later years, as I indicated yesterday, have been very productive in scholarship, and so I think those factors, the earlier placement on the schedule, coming in with a doctorate to begin with, and as an assistant professor, definitely had an effect on relative placement in terms of salary placement.

That combined with very spotty and limited salary increases that were allowed over a period of time has an effect as well.

(Tr. 11,940-941).

Assuming, without deciding, that Dr. Sheperd is an equally qualified man who performs substantially the same job as Dr. Waugh, the salary differences between Dr. Waugh and Dr. Sheperd are explainable on the basis of legitimate

differences in starting salaries and other factors which differentiate salaries in the academic community -- that is, years since highest degree and years in rank. (See the decision of the court with regard to Dr. Joanne Amspoker.)

DR. ESPESETH

Dr. Knute Espeseth received a B.S. degree in business education/history from Minot State Teachers College, North Dakota, in 1955; an M.S. degree in education from the University of North Dakota in 1961; and a Ph.D. degree in special education/educational psychology from the University of Wisconsin in 1965. He joined the faculty at the UofO College of Education in 1965 (two years after Dr. Waugh). His initial appointment was at the rank of assistant professor. (Dr. Waugh was an instructor

at this time.) Dr. Espeseth became an associate professor in 1969, (two years before Dr. Waugh received her Ph.D. degree and while Dr. Waugh was at the rank of senior instructor and five years before Dr. Waugh became an associate professor). Like Dr. Waugh, Dr. Espeseth has never become a full professor.

As to Dr. Espeseth's credentials, Dr. Waugh testified as follows:

> Q [By Mr. Willner] All right, before coming to the University of Oregon, what prior experience did Dr. Espeseth have in teaching, and what prior experience did you have in teaching?
>
> A He had taught crippled-mother, health impaired teachers of children for five years and was a psychologist for one year, total of six years of relevant experience; I had had 9.
>
> Q Did you compare your record of scholarship and research with Dr. Espeseth?

A Well, obviously, mine is superior completely. Doctor -- to be exact on this vita he lists -- it was five items. Three of them are in refereed journals, two of them are other publications.

. . .

Q How do you compare the teaching qualities or teaching experience of Dr. Espeseth with yourself?

A The document that I have, that does that, that is available to me, is a document that was prepared by a doctoral student who followed up some of our students. In the College of Education we have a continuing effort to assess the quality of our training, and so, a student by the name of Helen Begen interviewed 30 people who had completed their Masters Degrees, then they were teaching within the geographic area of Eugene, and she asked them to list the courses that they felt were most useful to them, and also the ones that were least useful.

The two that were identified as most useful were the ones that I teach, 15 students identified Diagnosis Basic Skills, which, of course, I taught in conjunction with my work in

DeBusk Center; and seven identified practicum that that was the most useful, and of the courses that were identified as least useful, one of them was taught solely by Dr. Espeseth, historical legal bases, then another one was shared with Dr. Sheperd, another comparator, another member of the faculty.

. . .

Q Compare your service to the institution with Dr. Espeseth's service to the institution.

A Mine is superior.

Q And what do you base that statement on?

A On the numbers of committees that I served on.

q And what is the highest level committee you served on in the university?

A Highest level?

Q Yes, most significant committee?

A I would expect the faculty personnel committee, the one we talked about earlier is one.

Q And that is elected by whom?

A All the faculty members in the University of Oregon.

Q How many people serve on the faculty personnel committee?

A Eight, I believe.

Q And Dr. Espeseth, ever served on that committee or any comparable committee at the University?

A He hasn't served on that committee.

(Tr. 2,049-052).

The Board concedes that overall, and particularly in recent years, Dr. Waugh's scholarship is better than Dr. Espeseth's. Dr. Waugh has more articles published in refereed journals than Dr. Espeseth. However, Dr. Espeseth's scholarship was strong enough in his earlier years to permit his promotion from the rank of assistant professor to the rank of associate professor.

Dr. Espeseth has coordinated several programs for the mentally retarded and

has served as chair of the special education area from 1974 through 1977. Dean Gilberts testified regarding Dr. Waugh's and Dr. Espeseth's careers:

> Dr. Espeseth received his Ph.D. from the University of Wisconsin in '65, was promoted to associate professor in '69 and, again, that was several years before Ruth [Dr. Waugh] was appointed assistant professor.
>
> . . .
>
> He had also had a similar experiential background prior to getting his doctorate and coming into higher education. And his early years, as I indicated, his productivity in terms of scholarship was reasonably strong. Knute [Dr. Espeseth] has been a very effective member of the faculty over the years, serving in the position of the head of the Special Ed. Department for a period of time, currently working on off-site training programs in Southern Oregon.
>
> I think that probably Knute is a closer comparison on balance than Dr. Sheperd. However, there are factors, again, of coming to the

> University of Oregon in 1968 and having the advantage -- as an assistant professor, having the advantage of those extra years in the university as a professor.

(Tr. 11,942-943).

The most significant differences between Dr. Waugh and Dr. Espeseth are that Dr. Espeseth received his Ph.D. degree six years before Dr. Waugh; he obtained the rank of assistant professor six years before Dr. Waugh; and he obtained the rank of associate professor six years before Dr. Waugh. The dates faculty members receive Ph.D. degrees and move ahead in rank are important to their salaries. Promotions ordinarily trigger salary increases. Salary at hire is determined in part on rank placement.

Dr. Espeseth's starting salary was $9000 in the 1964-65 academic year.

That same year, Dr. Waugh received $7200. The court knows nothing about the circumstances of Dr. Espeseth's beginning salary. Whatever those circumstances were, the fact that he had just received a Ph.D. degree justifies a salary greater than Dr. Waugh's. Since 1977, Dr. Waugh's salary increases have exceeded those of all three of her comparators. This is probably indicative of the fact that her productivity increased during those years. Her rank as instructor and senior instructor in her earlier years undoubtedly affected her salary. The evidence presented by the Board suggests that because Dr. Waugh was employed full time while obtaining her Ph.D. degree, her low productivity during the earlier years also affected her salary. On the other hand, Dr. Espeseth had his Ph.D. degree

at or shortly after he came to the UofO.

Assuming, without deciding, that Dr. Espeseth is an equally qualified man who performs substantially the same job as Dr. Waugh, the salary differences between Dr. Waugh and Dr. Espeseth are explainable on the basis of factors which legitimately differentiate salaries in the academic community -- that is, years since highest degree and years in rank. (See the decision of the court with regard to Dr. Joanne Amspoker.)

MISCELLANEOUS CLAIMS

Dr. Waugh claims that she was discriminated against on the basis of her sex in that she was assigned to practical supervision courses (also referred to as practicum assignments) which are more burdensome and have less status than regular teaching positions and which take so much time that the

writing and research necessary for professional advancement cannot be done.

Dr. Waugh testified as follows:

> Q [By Mr. Willner] Dr. Waugh, in the College of Education at the University of Oregon during the 20 years that you were in that college, was there any difference in the assignment of faculty women and faculty men?
>
> A The major difference has been assigning a faculty woman to practical supervision. Practical supervision is time consuming, low status and that was one of my responsibilities through the first eleven years of my tenure at the University and then females followed me.

(Tr. 2062).

> Q Dr. Waugh, what difference does it make in a professional career to be assigned to practicum assignments?
>
> A Limits the amount of time for research and writing.
>
> Q And why is that of importance?
>
> A Practicum assignment means that you are there observing the individual as a teacher or counselor or whatever. It

> often means traveling to schools where the supervision occurs. So the amount of time required for six practicum students is often as much as the time required for teaching a course with sixty students.

(Tr. 2,065-065)

Dean Gilberts testified that these practicum assignments are the most important part of a teacher training program. He explained that he would like to see the teacher training program expanded to a fifth year in order to provide another year of field-based training experiences. Dean Gilberts testified that the College of Education seeks faculty who have had successful classroom experiences to be practicum supervisors and that there are more women with such experiences than men. Given the fact that Dr. Waugh's primary experience before she started working at the UofO was as an elementary school

teacher, it is logical that she would be a candidate for practicum supervision. Furthermore, Dr. Waugh has not been involved in practicum assignments since 1974.

Dr. Waugh also testified that women have not received an appropriate proportion of administrative positions in the College of Education. She acknowledges that she has never sought any administrative position other than the one she now holds as acting chair of the area of special education, and that she knows of no other women recommended for administrative positions who did not receive them. In fact, Dr. Dianne Rinehart was the Assistant Dean in the College of Education beginning in 1978 and is now the Dean of the College of Education at the University of West Virginia. Dean Rinehart was replaced by

Dr. Diane Dunlap, who testified that she has received support for her aspirations to higher administrative positions. Finally, Dr. Edna Dehaven and Dr. Faye Haisley have held administrative appointments in the College of Education.

Dr. Waugh next complains that Dean Gilberts once told her in 1974 that "women don't want responsibility." Although Dr. Waugh considered this to be an "off the cuff" comment, Dean Gilberts testified that this statement was made in the context of asking Dr. Waugh if she would be interested in becoming head or coordinator of the Special Education Program.

Dr. Gilbert testified:

> I had asked Ruth [Waugh] to chair that committee which was composed of a number of faculty members and to make recommendations to me about

> where it should be placed. And in the course of talking about the committee's deliberations, Ruth and I were visiting in my office. I said, well, one of our problems is going to be who is going to provide the leadership for that unit. Who will be the head or coordinator of that particular program. And I asked Ruth if she would be interested in that kind of position. And she indicated she would not. And I indicated that it had been one of my real disappointments in my career when competent, able women were asked to consider the possibility of a position such as that, that I had been turned down much more often than I liked.

(Tr. 11,962).

Lastly, Dr. Waugh complains that junior women faculty have fewer mentor relationships with senior faculty than junior male faculty do. However, she admits that she worked with Associate Dean Robert Schwarz in a mentor relationship during her administrative internship.

Dr. Waugh cannot prevail on her miscellaneous claims.

OREGON STATE UNIVERSITY

CORVALLIS, OREGON

Dianna Kale

Dr. Margaret Lumpkin

DIANNA KALE

Dianna Kale, a visiting assistant professor in the Women's Studies program at Oregon State University (OSU), claims that she was discriminated against on the basis of her sex while serving as program director of art education in the School of Education at OSU in that: (1) she received a lower salary than male colleagues in the same position with substantially equal experience and qualifications; (2) she was not promoted to a tenure track position while men with substantially equal experience and qualifications were so promoted; (3) she was forced to carry a heavier workload than male faculty with substantially equal positions; (4) she was not hired on a tenure track position in 1981 even though she was fully qualified to perform the job; (5) she was not offered

the rank of assistant professor in 1981, even though she had been recommended by the search committee twice for the position, and instead was hired to perform the same duties as advertised in the position description, but at a lower rank and salary; (6) she was not given adequate economic and other support necessary for her to complete her Ph.D. degree, and then OSU used the delay in obtaining her Ph.D. degree as an excuse not to hire her for a tenure track, assistant professor position; and (7) the budget cuts which resulted in her position being eliminated disproportionately affected women and minorities who held fixed term contracts. Ms. Kale is an intervening plaintiff and did not file a complaint with the Equal Employment Opportunity Commission.

Ms. Kale received a bachelor of art education degree from Wichita State University in 1972 and a master of science degree in art education from the University of Oregon in 1977. She received her master's degree while working toward her doctoral degree in art education at the University of Oregon. Prior to being hired at OSU in 1977, she held the positions of graduate teaching fellow, Department of Art Education, University of Oregon, 1976-77; research assistant, Institute for Community Arts, University of Oregon, 1974-76; art education instructor, Lane Community College, winter quarters 1974-76; art instructor, Nebraska Public Schools, 1972-73; and art instructor, Project Teach, a federally funded program designed for teachers of core area

ghetto children, Wichita, Kansas, 1971-72.

Ms. Kale is an artist whose field of expertise is drawing. She has shown her work at several exhibits and made presentations in 1976 and 1978 to the National Art Education Association. She has been active in professional community affairs and professional affiliations. She has also received honors for her art work.

At the time that Ms. Kale applied for a position at OSU, she had not completed her coursework for her Ph.D. degree. Ordinarily a doctoral degree student completes the coursework, takes comprehensive examinations, and then is advanced to a status called "candidacy" and obtains approval for a dissertation study. On Ms. Kale's employment

application she calls herself a "candidate" for a doctoral degree.

Ms. Kale received her first teaching appointment at OSU in 1977 and thereafter taught elementary and secondary art education courses mostly on a part-time basis in the OSU School of Education until 1982, when her position was eliminated as a part of a program reduction required by a financial crisis. The amount of time Ms. Kale taught during those years varied from term to term, but she was never employed less than half-time. She was always on a fixed-term contract.

Ms. Kale was hired to perform the duties of art education "program director" for the OSU School of Education. She replaced Phyllis Richardson, who left her part-time position in the College of Education for

a full-time position in the Department of Art in the College of Liberal Arts. The major mission of the OSU School of Education is teacher training. For each area in which the School of Education trains students to be teachers (e.g., speech, English, foreign languages, vocational education), a faculty member called "program director" has the responsibility for making certain that the students graduating in that particular teaching area meet the State of Oregon's requirements for teacher certification. Program directors have the responsibility for advising students, preparing reports for the teaching practices committee, teaching a methods course, and supervising student teachers. These "program directors" perform no "administrative" duties in the sense of making decisions for other

faculty members regarding promotions, tenure, or salary increments. Ms. Kale's duties, then, were to make sure that Ms. Kale students graduating in art education would meet the State of Oregon's requirements for certification as art teachers. Hers was a one-person program. In that capacity, she advised students who sought state certification in art education, supervised student teachers, and supervised the junior level theory and practicum students. She also performed various other duties assigned by the Dean of the School of Education. For example, Ms. Kale received an increase in salary one semester to paint a mural in the faculty room.

SALARY DISCRIMINATION CLAIM

Ms. Kale claims that because of her sex she received a lower salary than equally qualified male colleagues in the

School of Education who performed substantially the same job as she performed. In support of her claim, Ms. Kale compared her salary to the salaries of male faculty in the School of Education. Exhibit 576, which follows this page, shows this salary comparison.

Ms. Kale testified that she chose individuals listed in Exhibit 576 as her comparators "because they were identified as faculty members in the School of Education who had Master's degrees or less, who had approximately the same amount of experience -- years of experience or service to the university, and also were on fixed-term appointment." (Tr. 7,883). The figures as presented show that Ms. Kale received a lower salary than her male comparators. Therefore, the court must determine whether these are appropriate

	1973-74	1974-75	1975-76	1976-77
DIANNA KALE				
WALTER LORENCE				$16,293.75
JUAN GUZMAN	$10,377.00	$11,138.00	$12,642.00	$14,100.75
LAWRENCE MOELLER	$13,500.00	$14,110.00	$15,588.00	$16,524.00
RICHARD SWANSON				
JAMES SCHLEGAL				
RALPH YOSHIHURA				
BAYARD HILLWAY				
DARRELL LANGEVIN				
JOHN HAVRELIK				
JAMES COLMAN				

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	1977-78	1978-79	1979-80	1980-81	1981-82
DIANNA KALE					
WALTER LORENCE	$12,000.00	$12,483.00	$13,482.00	$14,292.00	$15,597.00
JUAN GUZMAN	$17,275.00	$17,963.00	$18,684.00	$20,088.00	$21,834.00
LAWRENCE MOELLER	$15,513.75	$16,128.00			
RICHARD SWANSON	$16,974.00				
JAMES SCHLEGAL			~~$21,168.00~~ 18,997.26	$21,168.00	
RALPH YOSHIMURA			$18,000.00	$19,800.00	$19,872.00
BAYARD HILLWAY				$16,500.00	$18,018.00
DARRELL LANGEVIN				$16,065.00	$17,874.00
JOHN HAVRELIK				$16,065.00	$17,541.00
JAMES COLMAN				$16,267.50	$16,775.75
				$14,967.00	$17,217.00

PLAINTIFF'S EXHIBIT 576-R

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comparators, and if they are appropriate comparators, whether other legitimate, nondiscriminatory reasons account for the salary differences. Dr. Sylvia Tucker, former Dean of the OSU School of Education, and Dr. Charles Stamps, former Assistant Dean of the OSU School of Education, both testified that Mr. Lorence, Mr. Guzman, Mr. Swanson, Mr. Yoshimura, Mr. Hillway, Mr. Havrelik, and Mr. Coleman are not appropriate salary comparators for Ms. Kale because they were all on grants and not funded from School of Education funds as were Ms. Kale, Mr. Moeller, and Mr. Schlegal. DMr. Stamps explained:

> A. Grants are short lived. Often one, two or three years maximum with the understanding that you are no longer employed once that grant expires. You -- when the person writes the proposal for the grant, he or she also requests a salary. It is not uncommon for the salary

> of that individual to be unlike School of Education faculty to be hired. And the purpose of that is because they are a high risk group. They are not subject to being renewed as a fixed term person or a tenure track person is. And that's the justification of paying them a higher salary.

(Tr. 17,162).

In addition to these faculty having their salaries funded from a different source than Ms. Kale's, all of the male faculty members listed on exhibit 576 are in industrial or vocational education. For example, Mr. Moeller[1] was in the area of electronics. Dr. Stamps, referring to industrial and vocational education, explained:

> A It is a high market. It is a high market discipline in which you are constantly competing with business and industry siphoning them off. And we often had to pay more. An example is just before I left we hired a man at full professorship at the top salary

because of the market in industrial education.

(Tr. - 17,163).

Ms. Kale does not dispute that all of her comparators are in the industrial or vocational education area, that the industrial and vocational fields are "high market," or that all but Mr. Moeller and Mr. Schlegal are funded by grants. Ms. Kale argues, however, that the Board's explanation is simply a pretext for sex discrimination because fixed-term contract positions, like grant-funded positions, "involve no guarantees of continued employment."

While fixed-term appointments may be subject to many contingencies, especially in times of budget crises, this court can not overlook the differences between Ms. Kale and her comparators in the areas of sources of funding and

educational specialties. Grants are often written by faculty members in order to fund their own positions, and their salaries are often negotiated with the granting authority as well as OSU. The particular granting authority may have a salary range or salary flexibility that the OSU School of Education does not have. (Tr. 17,878). Faculty on grants may be subject to joint administration and may be required by the granting authority to perform various jobs as well as teach. As Dr. Tucker summarized:

> In some cases the persons in those jobs have written grants and negotiated salaries, but it's never just the function of the university in the traditional salary structure on the grants, unless it's an in-university, in-house grant.

(Tr. 17,878). Ms. Kale apparently contends that since she came to OSU when her comparators did,[2] and since she had

approximately the same amount of experience they had, and since she had the same degree they had, she must be paid the same as they are paid, without reference to disciplines or funding sources. This position ignores reality. Certain disciplines are in demand. Demand translates into money. The Board's explanation for the salary differences between Ms. Kale and her comparators is credible and logical. Although Ms. Kale's salary is lower than those to which she compares herself, the court finds that the reasons for those differences are legitimate and not a pretext for sex discrimination.

PROMOTION

Ms. Kale asserts that she was discriminated against because of her sex in that she was not promoted to a tenure track position, while men with

comparable experience and qualifications were so promoted. Ms. Kale asks the court to find that "between 20 and 30 males who began teaching on fixed term contracts at approximately the same time as Ms. Kale are now assistant professors." (Plaintiff's Proposed Finding of Fact #24).

Ms. Kale testified as follows:

> Q [By Mr. Willner] [D]id you make a count of the number of male assistant professors without Ph.D.'s at OSU?
>
> A I started a count in the summer -- this summer, and discovered that there were somewhere around 20 to 30 male Ph.D.'s (sic) who were instructors who came about the same time I did on -- instructors -- excuse me, they were assistant professors who came about the same time I did on fixed term contracts.

(Tr. 7,895).

This is the only evidence Ms. Kale submitted in support of this claim. It

is totally insufficient to support any claim. It may be that this evidence was offered in support of Ms. Kale's claim that she was not hired to the advertised assistant professor position in 1981. To the extent that this evidence is not related to the advertised assistant professor position claim, the court declines to consider it further.

WORKLOAD

Ms. Kale asks the court to find that her class load was much heavier than the male faculty members of the School of Education as measured by the School of Education's own formula for determining FTE allocations for supervisory field experiences and faculty loads, and to further find that the male faculty members of the school of education had research time available and she did

not.[3] (Ms. Kale's Proposed Findings of Fact #22 and #23).

To support her claim, Ms. Kale relies on Exhibit 594. The first page of exhibit 594 is entitled "Formulas for Determining FTE Allocations for Supervisory Field Experiences and Faculty Loads." The subsequent pages of exhibit 594, which were prepared by Ms. Kale, attempt to compare Ms. Kale with male faculty by means of computing and comparing the amount of FTE they generated with the amount of FTE they were assigned. The first problem with exhibit 594 is that it is not complete or accurate. Referring to the figures she relies on to compare herself with the male faculty, Ms. Kale notes on the exhibit:

"This information may not be complete or accurate as it was drawn from assignment sheets in Dr. Stamps' office.

This concern stems from knowledge of inaccuracy in my assignment sheets from the same source.

This exhibit, which on its face concedes that it may not be accurate, has little probative value.

Furthermore, Dr. Stamps explained that the first page of exhibit 594 on "Formulas" was a guide for translating into FTE the duties of faculty who were supervising student teachers. (Tr. 17,145). Dr. Stamps testified that "generated" FTE (determined by student credit hours) was not comparable to "assigned" FTE (determined by the faculty workload including the number of hours taught). He stated that "generated" FTE was used mainly in budget allocations. (Tr. 17,146).

Both Dr. Tucker and Dr. Stamps testified that Ms. Kale's workload was never increased without a corresponding

increase in FTE and salary. (Tr. 17,148, 17,858). Dr. Tucker and Dr. Stamps both testified that Ms. Kale took on work that she was not assigned, and Dr. Tucker testified that because Ms. Kale was often slow in completing some of the work that she was assigned, she "may well have felt that she was overloaded because she had things from the first year to complete." (Tr. 17,862).

Ms. Kale's only evidence in support of this claim, besides her own testimony that she was only given half the FTE that male faculty were given, is exhibit 594, which, by her own admission, "may not be complete or accurate." The Board's witnesses testified that even if Ms. Kale's figures were reliable, the exhibit attempts to compare FTE figures which cannot be compared. Ms. Kale

offered no evidence to rebut the Board's explanation. The court finds that Ms. Kale has failed to prove that she was given a heavier workload than her male colleagues.

SUPPORT FOR DOCTORAL WORK

Ms. Kale claims that she was discriminated against because of her sex in that she was not given adequate economic and other support to allow her to complete her Ph.D. and that thereafter OSU administrators used her delay in obtaining the Ph.D. degree as an excuse not to hire her for a tenure track, assistant professor position in 1981. (Ms. Kale's Proposed Findings of Fact #30).

Ms. Kale testified that Dr. Tucker "volunteered to support my going back to school at the University of Oregon" (Tr. 7,856) during the summer of 1980 and

stated that "the school of education would pay for [her] tuition." (Tr. 7,856). Ms. Kale did go back to school that summer, but complains to this court that, "they did not provide the help that had been promised." (Tr. 7856). In addition, Ms. Kale asks the court to find that she was not supported by OSU in her efforts to obtain her doctorate because she was advised in 1980 that she could not attend a seminar on "ethnic heritage federal grants" on university funds since it was believed that it would help her in her dissertation. (Ms. Kale's Proposed Findings of Fact #8. See also Tr. 7,854).

Ms. Kale does not offer any evidence, direct or indirect, that the OSU School of Education financially supported any other faculty member, male or female, in pursuit of his or her

terminal degree. Whether or not Dr. Tucker made a promise to Ms. Kale and thereafter breached that promise, there is no evidence in this record that Dr. Tucker's alleged actions were based upon a sex bias. However, it is clear from the record that both Dr. Tucker and Dr. Stamps were eager for Ms. Kale to complete her Ph.D. degree and adjusted Ms. Kale's workload to accommodate her pursuit of that degree. (Tr. 17,932). The court finds that Ms. Kale has not carried her burden of proving that she was discriminated against because of her sex in failing to receive economic and other support from the OSU School of Education in order to complete her doctoral degree.

1981 JOB SEARCH

In 1981, the OSU School of Education advertised as open a position in art

education for the 1981-82 school year. The recipient of the position was to teach elementary and secondary art methods and to coordinate the secondary art education program. The position was denominated tenure track, at the level of assistant professor. A doctoral degree was required. Other requirements were teaching experience, evidence of research in education, and a record of service to the academic/educational community. The responsibilities of the position were to be teaching and advising at the undergraduate and graduate levels, school and university committees, research, field supervision, and off-campus teaching. Ms. Kale applied for the position despite the fact that she did not have a doctoral degree, and she was not hired. Ms. Kale now claims that OSU's requirement of a

doctoral degree was a pretext for sex discrimination.

The notification of academic position opening (Pl. Ex.530), filed by the OSU School of Education with the affirmative action office, is dated December 15, 1980. In the spring of 1981, OSU offered the position to a female applicant with a doctoral degree, but she did not accept the offer. (Tr. 7,860). The search committee then recommended to the dean that since Ms. Kale was available, she be hired. Dean Tucker, however, asked for a further search. Several months later, another applicant with a doctoral degree was considered, but this person was unacceptable and was not offered the position. The search committee again recommended to the dean that since Ms. Kale was available, she be hired.

Ms. Kale was then offered a position for the 1981-82 school year on a fixed-term contract at the instructor level with a base salary of $15,597. The salary range for the position advertised was $16,000 to $17,000. Ms. Kale argues that she was qualified for the position as advertised and should have been appointed to that position and that the reason she did not receive the appointment was sex discrimination. Ms. Kale testified:

> Q [By Mr. Willner] All right. Did you have a discussion with Dean Tucker about the salary for the position?
>
> A Yes, I did.
>
> Q At that point you had been doing the position for how long?
>
> A I had just completed my fourth year.
>
> Q All right. And did you ask Dean Tucker for a higher salary?

A Yes, I did.

Q And what was her response to that request for a higher salary?

A No.

Q Did you have a further discussion, a further discussion with Dean Tucker about her views on your attitude?

A Yes, I did.

Q Approximately when was this?

A The next day.

Q And what month are we up to, approximately?

A September of 1981.

Q All right, and what did Dean Tucker say about your attitude and what she was considering -- and what she had considered doing?

A In the discussion about salary and meeting the position announcement, I requested that I felt like I qualified for the position as it was announced and asked her for -- asked her for the increase in salary, for annual track and for assistant professor level. And she said those were not negotiable.

Q By annual track, do you mean tenure track?

A Yes, annual tenure track. And we had a -- some words over that. The next day I went in and accepted her position as she had offered it for an instructor, fixed term at the lower salary.

Q What did she say?

A I said I was sorry to have argued with her, and she said she was sorry, too, that I had argued with her, too. And she said that I had -- she had been considering not hiring me because of my negative energy.

Q Because of your negative energy. Did you ask her what she meant or

A We had some discussion about that.

Q What did she next say?

A She said that she wanted to help me overcome this negative energy. Okay. And then we sat down and had some discussion about it. And she said that she had -- she implied that she had thought it over, and she thought perhaps the reason why I had such negative energy was because I

was a woman and a minority [Ms. Kale is a native American], and it didn't work that way with her.

Q Did she make any further comments about the level of your salary?

A Yes, she did. She told me that she had taken me from low poverty to high poverty.

Q All right. Was any action taken in connection with your position a few weeks later?

A Yes, I was hired for that year. And in September at the faculty meeting that Dean Tucker announced the budget cuts which she had been working on during those days which I negotiated -- attempted to negotiate salary -- at a faculty meeting she announced that

. . .

Q All right, what announcement was made shortly thereafter?

A Dean Tucker announced in faculty meeting that due to budget cuts, she would recommend the suspension of a secondary art education [program director] and that would involve approximately one-half of my salary.

(Tr. 7865-69).

Dr. Tucker and Dr. Stamps testified that although Ms. Kale was hired on a fixed-term contract to cover the courses that the advertised position would have covered, she was not expected to and could not fulfill the position as advertised, because she did not have a doctoral degree and therefore could not participate in advising graduate students as the position contemplated. Dr. Tucker explained that the doctorate was very important to OSU:

> A [Dr. Tucker] No, we advertised for an art educator every year, I guess, after Phyllis [Richardson, Ms. Kale's predecessor] left, trying to find someone with a doctorate. But during that period of time there was a rather long, long search process. We were -- we were looking for someone with a -- with a doctoral degree to be our art educator, hopefully someone who would be available to the department of art and the college of liberal arts

should they choose to employ that person, but someone who could do both elementary and secondary, who was a studio artist as well, had the respect of the art community as well as the education community. And it was during a long process during the termination of a long -- after the termination of a long process where we found a couple of people with doctoral degrees. As I recall, we offered the job to one person who declined. And I don't recall whether the job was offered to a second person. But then finally the department -- it again was getting late in the summer, and I don't recall the date -- said Diana [Ms. Kale] is available, and we think we must get on with it, and we would recommend that you hire Diana. And

Q [By Mr. Casby] Did that mean . . .

A And the position was . . .

Q Just to understand what you just said, did that mean hire her for the . . .

A For the year.

Q permanent position that was being advertised or what?

A No. No. I was about to explain that the position announcement said assistant professor with a salary range and with a doctorate required. So -- and I don't recall what else was in, but I know that those things were in. And as I said, we could not find someone, it was getting late and the department said we have to meet the classes, Diana's available and we suggest that you employ her for the year. But it was not possible to employ her under the circumstances in the job description because she did not meet those requirements.

Q In what respect?

A She did not have a doctorate. That -- that was the primary one. So this discussion took place surrounding that. Diana came into my office and . . . demanded that she be given an assistant professorship, that she be paid the salary on the job announcement and that she be placed on tenure track. And I said Diana, I cannot do any one of the three because you do not meet the requirements as they were listed on the job description and okayed by affirmative action. And then proceeded to offer her the job for the year. And I cannot

tell you the differential in salary.

But I said I cannot place you on tenure track and I cannot offer you the assistant professorship. And the discussion was -- was around those three areas.

And Diana, as I recall, was not very happy with that and said that -- she again said this is what's on the job description and this is -- this is what I'm -- what I want. I want to be placed on tenure track, I want salary that's advertised and I want to be an assistant professor. And to the best of my recollection, Diana then said I will have to think about it. And that's -- that's about what I remember about that.

There were some other discussions about how she conducted her classroom and so forth, but the main conversation and perhaps the unpleasant part of the conversation surrounded Diana's demands that she be given those three things as advertised in the job description.

(Tr. 17,867-870) (Emphasis added).

Dr. Stamps offered this explanation of the requirements for the position that was advertised.

> Q [By Mr. Casby] And what does it ask for in the way of educational qualifications?
>
> A A doctorate.
>
> Q And when did that come about, that decision? A Art education was one of those programs that was to 17- Ms. Kale be cut because of financial difficulties in the state. And we therefore were looking for an individual who could be more versatile than just teaching the elementary art program because the enrollment in elementary art education was being retained but not the secondary, not the people majoring to be a teacher in art education. I hope I'm saying that clearly enough. The students who were going to be elementary majors would take a course in art education but they were not in a program to be an art educator, a 406-N I'm referring to. Education 406-N. We had a great shortage of faculty members who were approved and functioned as graduate faculty. Diana did not have graduate faculty status nor did the previous

> person to her have graduate faculty status to advise in the school of education. And we felt that we needed someone who could go across the board and do advising and work with doctoral candidates and finishing the dissertation in a broad base like in foundations.
>
> . . . [W]e felt that if we were ever going to build a graduate program in art, we needed someone with a doctorate. We had no argument to do that if we did not have someone with a doctorate. And on the basis of that we asked for someone with a doctorate. (Tr. 17,164-165).

In rebuttal to the Board's explanation of why she was not hired for the advertised position, Ms. Kale asserts that the requirement of a doctorate "was established specifically to prevent [her] from attaining the position and that it was not a necessary requirement." (Tr. 7928). Ms. Kale points to several facts to support her claim that the reasons

given by the Board are simply a pretext for sex discrimination.

First, she claims that because the Board's witness, Dr. Robert Barr, current Dean of the merged OSU-Western Oregon State College School of Education, testified at trial that he would have "preferred" to have someone with a doctorate and the position description stated "doctorate required," the decision to require (as opposed to prefer) a doctorate was made to specifically prevent Ms. Kale from retaining the position which she had held for four years. (Plaintiff's Proposed Rebuttal Findings of Fact #3).

The position description and the decision to require a doctorate for the position were initiated prior to December 15, 1980. Dr. Barr did not join the OSU faculty until January, 1982, and was

not involved either directly or indirectly in the preparation of the notice or in the decision not to hire Ms. Kale in 1981. In his testimony Dr. Barr was asked to comment on Ms. Kale's 1982 termination as a result of budget reductions. He stated generally that, "the demand of the land grant university would be that any faculty member would be preferred to have a doctorate. And under -- only under unusual situations would we consider anything other than that." (Tr. 17,270-271).

Dr. Barr's general comments have no probative value whatsoever, since he was not in any way involved with the decision to require a doctorate. His comments show only that he felt that to hire someone without a doctorate would be a rare exception. Both Dr. Stamps and Dr. Tucker, who made the actual decision to

require a doctorate, testified at length as to the importance of a doctorate to the OSU School of Education. The court finds their testimony credible.

Second, Ms. Kale claims that Dr. Tucker made the statement, "Dianna, I'm considering not hiring you at all because of all of your negative energy," and, "The reason I believe you have such negative energy is because you are a woman and a minority," and that Dr. Tucker did not deny the statements. Ms. Kale claims these statements are evidence of sex discrimination. Dr. Tucker explained these alleged statements as follows:

> Q [By Mr. Willner] Yes. Did you say words to the effect "Dianna, I believe the reason you have such negative energy is because you are a woman and a minority, and you have had to operate that way in the past?"

A Dianna and I talked at various times about being female and Dianna, certainly, about being minority. And if a statement close to those words -- it would not have been said out of context. It would have been said -- it would have been said with an understanding that I, too, have operated out of the category of a woman and certainly often the only woman in a situation.

The dean of education at Oregon State was a good example. I operated most of my life in a situation where I was operating out of female status, so I understand a little bit what that's about. And if I said those words, it would have been in light of saying, look, it's very difficult to be positive when you are operating out of a situation which sometimes makes you feel negative. And I do not -- I would never have said those words separate from -- from other statements which would have meant that, yes, I understand and I care.

Q Do you remember whether or not you said words to that effect?

A I'm sure at some time I would have said -- I don't know whether I said those words or

> under what circumstance. I am certain that I would never have said those words standing alone as you have said them.
>
> (Tr. 17,907-908) (Emphasis added).

Dr. Tucker did not deny that a conversation regarding negative energy and Ms. Kale's sex and racial status took place. A trier of fact can infer several things from Dr. Tucker's explanation of her comments. Dr. Tucker could be said to have recognized that sex discrimination was operating against Ms. Kale whether or not Dr. Tucker herself was acting in a discriminatory manner. On the other hand, Dr. Tucker could be said to have recognized the historical difficulties women often face in the workplace and to have wished to assure Ms. Kale that she would be treated equally. The true meaning of Dr. Tucker's testimony may lie somewhere in

the middle. With this in mind, the court will take into consideration the uncertainty of Dr. Tucker's comments in determining whether Dr. Tucker required a doctorate in the advertised position as a pretext for sex discrimination against Ms. Kale. Third, Ms. Kale asks the court to find that male faculty with masters degrees hold tenure track positions at the rank of assistant professor at OSU in support of her claim that requiring a doctorate of her was pretext for sex discrimination. Ms. Kale offers no specific examples in her testimony or exhibits to sup port this finding. Ms. Kale testified on cross-examination that she began to compile a list of assistant professors without Ph.D.'s but did not complete it and did not know where the partial list was. More importantly, she testified that to her

knowledge no one had been hired at the assistant professor rank in the School of Education without a doctorate since 1977. (Tr. 7,898). The court does not have sufficient facts before it to make a finding in this regard.

Fourth, Ms. Kale asserts that she was in fact hired for the position as advertised. Ms. Kale contends that her faculty assignment (job duties) on fixed term contract for the 1981-82 academic year was identical to the one advertised, proving that she was qualified for the position. The Board, through the testimony of Dr. Stamps and Dr. Tucker, claims that Ms. Kale could not fulfill graduate committee functions intended to be a part of the advertised position and in fact did not fulfill the duties of the advertised position. Ms. Kale contends that serving on graduate committees is

voluntary and not required as a part of a faculty member's assigned load and that art education was only a bachelors degree program anyway.

Both Dr. Tucker and Dr. Stamps confirmed that the art education program in the OSU School of Education offered no graduate level degrees but they explained that other disciplines in the School of Education offered both masters and doctoral degrees. Dr. Tucker explained the importance of having an art educator with a doctoral degree:

> A [Dr. Tucker] . . . the doctorate in art education for the person that we were hiring was very important because we had dissertations in the area of such -- such things as learning where a person might want to do something -- might want to do research on learning with a visual component of learning. How do students use the visual -- visual arts in learning. And it would be very important to have someone schooled in the visual arts.

> And an art education person I would presume, and one would have to presume that that's the case, that this is true. There might be a degree in our foundations area in Ed Psych where this would be the case. There might be a degree in vocational education where someone might be interested in what the visual arts would contribute to such a degree and it might be very important for a person on the committee to have that background.
>
> And whether or not, as I testified this morning, there was a degree in art education from my perspective was immaterial. We needed that skill. It was very important to the school.
>
> (Tr. 17,925-926).

The OSU School of Education offers the following higher degrees: Master of Arts, Master of Education, Master of Science, Doctor of Education, and Doctor of Philosophy. In order to direct the research of graduate students properly, the School of Education must have faculty with Ph.D. degrees. Faculty

members without Ph.D. degrees cannot participate fully on graduate student committees. Without a doctoral degree, Ms. Kale was ineligible to serve fully on graduate committees. She was deemed to be only an associate graduate faculty member.

While Ms. Kale claims that she was competent to perform the necessary graduate advising, the record contains a credible explanation of why she was not qualified to do so. The academic world is not alone in declining to equate "competence" and "qualification." The court finds that the School of Education was acting reasonably in attempting to hire someone with a doctoral degree in 1981, and was not using this qualification as a pretext for sex discrimination.

Fifth, Ms. Kale asserts that the courses she taught while at OSU have been and continue to be taught by faculty members without doctoral degrees. As examples, she names Scott Meyer, a male with a bachelors degree, who was hired to teach one of her courses in the summer of 1981; Phyllis Richardson, her predecessor, who did not have a doctorate; and James Kirk, a faculty member at Western Oregon State College (WOSC) who does not have a doctorate and who taught her courses after her position was eliminated.

In the summer of 1981, the School of Education appointed Scott Meyer, who had a Bachelor of Science degree in elementary education from OSU, to teach the course in elementary art education that Ms. Kale had developed and had previously taught. When Ms. Kale heard

of the proposed hiring of Scott Meyer, she went to the OSU Affirmative Action Officer, Pearl Spears Gray, intending to file a formal complaint. Although a formal complaint was not filed, Ms. Kale testified that Ms.Gray later informed her that Dr. Tucker and Dr. Lee Jenkins, the division coordinator for elementary education, both called Ms.Gray and "apologized for not following the affirmative action procedures that summer. " (Tr. 7863). Mr. Meyer's appointment for that course was can celled, and he was given another course to teach that summer. Ms. Kale was then offered the position for the summer of 1981. Ms. Kale was paid $1,503 and Meyer was paid $1,200. Apparently Scott Meyer only taught that one course that one summer at OSU.

Ms. Richardson, who was Ms. Kale's predecessor, held a joint appointment with the College of Liberal Arts and taught half-time as an art education teacher in the OSU School of Education. Mr. Kirk, by virtue of seniority and tenure was called upon to teach the art courses in the merged OSU-Western Oregon State College School of Education after the dust had settled on a major financial crisis. The School of Education was directed to make a major budget reduction totaling 7.5 percent of its budget. Because the Oregon State Legislature was concerned about program duplication, the OSU School of Education was also directed to review programs with an emphasis on a possible elimination of those that were available at other campuses. Dr. Tucker originally made preliminary recommendations for the budget cuts. Dr.

School of Education
Office of the Dean

Oregon State University

Corvallis, Oregon 97331

April 25, 1980

TO: Dear Tucker

FROM: Chuck Stamps

RE: FIXED TERM APPOINTMENT OF DIANNA KALE

I concur with Lee Jenkins, Division Coordinator of Teaching Specialties, that we do not renew Dianna Kale's Fixed Term appointment in Art Education for the academic year 1980-81. Attached is a copy of his letter.

There are several reasons why I agree with Dr. Jenkins:

1. It is imperative that the School of Education have an art educator who has graduate faculty status. While the majority of our art education students are enrolled in the undergraduate program, we lack the ability to enroll graduate students in art education since they would have to pursue the degree through Education.

2. There is a need to have additional School of Education Graduate Faculty since those who agree to serve as major professors have heavy loads.

3. It would greatly strengthen our staff if we hired an art educator who could teach both elementary and secondary art classes and methods of elementary and secondary art classes, could serve as an advisor to undergraduate and graduate students, and also possessed skills in graphics and media.

cs
Attachment

DEFENDANT'S EXHIBIT 3784 H2

COPY

School of Education Oregon State University Corvallis, Oregon 97331

April 25, 1980

TO: Chuck Stamps

FROM: Lee Jenkins, Coordinator
Teaching Specialties Division

RE: DIANA KALE--ART EDUCATION

It is my opinion that the Art Education position at Oregon State University needs to be filled with a person who has completed their doctorate. With the State Board of Higher Education's decision to have no liberal arts graduate work at OSU and with the only art person in the school of education ineligible for graduate faculty status, we've got a problem.

For two years, I've been hearing that Diana Kale's dissertation is getting done "this year." It is possible that her slowness in completing brochures, posters, advertisements, etc., is also carried over into her dissertation slowness. I have no evidence that her dissertation is being completed and recommend that Dean Tucker advertise for a full-time person in art education with a second teaching area. The graduate load is heavy here, and I feel we don't need any more faculty members who are not eligible for graduate faculty status.

My perception is that Diana Kale has been given an "opportunity of a lifetime." She has been given the chance to build the art program at OSU and the freedom to innovate while working at a salary higher than that of a GTA and while completing her doctorate. She has not taken advantage of this opportunity.

DEFENDANT'S EXHIBIT 3784 I R

Barr succeeded Dr. Tucker as Dean of the School of Education before any action was taken upon her recommendations. Dr. Barr created an ad hoc faculty committee for budget and program reductions. Each department of the School of Education was represented, as well as a representative of the classified and fixed-term employees.

Ms. Kale represented the fixed-term contract faculty on the ad hoc committee. She was given a list of fixed-term and non-tenured faculty members at the School of Education. She noted from the list and thereafter informed the committee that the majority of the fixed-term faculty were women.

Ms. Kale testified that the ad hoc committee recommended that the School of Education's priority system be followed. (Tr. 7,875). Ms. Kale was asked:

> Q [By Mr. Willner] And the priority system, what did that do to the fixed-term jobs?
>
> A It really did not necessarily point out a fixed-term position. Rather, it said that certain programs and types of programs would be dropped. But the impact was upon the fixed-term positions in that a number -- the majority of the positions cut were with fixed-term, and only one annual track person was cut.

(Tr. 7,875-76).

Ms. Kale asserts that five positions were eliminated in accordance with the priority system, including her own. Four of the people in these positions were women and one was a minority man. She asserts that this termination of women and minorities in the School of Education suggests a pattern of discrimination which adversely affects women. (Plaintiffs' Rebuttal Findings of Fact No.17).

All disparate impact type claims have been excluded by the court. See Opinion and Order of August 10, 1984. In order to prevail, Ms. Kale must show that she and other women were treated differently because of their sex in the process of budget reductions. Ms. Kale admits that the School of Education's priority system was followed in order to determine which programs were to be reduced or eliminated and which staff were to be terminated. In order to prove disparate treatment under these circumstances, Ms. Kale must show that the School of Education's priority system was, in fact, one of differentiating on the basis of sex or a pretext for sex discrimination.

The 1982 budget reduction program was a crisis situation affecting many of the programs in the School of Education,

including the art education program. In addition to the five individuals named by Ms. Kale, the reduction affected people in foreign language education, drama education, journalism education, speech communication education, and language arts/social studies education.

Dr. Barr testified that he prepared and circulated a document (Def. Ex. 3784 W) which was intended to outline the priorities and processes that the School of Education would utilize in order to accomplish the necessary program reductions. That document was relied upon by the ad hoc committee, of which Ms. Kale was a member, and contained the following section outlining the process of program eliminations:

> B. Program Eliminations. It will be necessary to eliminate some programs in the School of Education. This programmatic elimination does not directly

relate to budget cuts, but obviously it is involved in the pro cess. A number of criteria have been identified by the Chancellor of the Oregon State System of Higher Education. These criteria included the following:

1. Give first priority to preservation of quality education within the System.

2. Retain, to the extent possible, programs central to the missions of the institutions.

3. Protect programs directly related to economic development. The Chancellor's Office indicates that systematic program elimination will hopefully avoid the closure of any institutions in the state. Decisions regarding program elimination will be based on a careful Program Review in which priorities will be given on the following basis:

1. Doctoral programs and graduate programs with state wide mission.

2. Undergraduate certification

programs with statewide mission.

3. Graduate certification programs duplicated in some but not all areas of the state.

4. Graduate certification programs duplicated widely throughout the state.

5. Graduate programs not related to certification.

6. Undergraduate programs duplicated in some, but not all areas of the state.

7. Undergraduate programs duplicated widely throughout the state.

However, in each instance, faculty status, program quality, placement, enrollment, and cost per SCH, will be taken into consideration. Programs most vulnerable will be those duplicated widely on other campuses, staffed by fixed term or annual tenure, and where elimination will affect the fewest numbers of students and faculty. Also, every effort will be made to insure that decisions regarding programmatic elimination will be made on this campus.

(Emphasis in original).

Dr. Barr explained in his testimony that fixed-term faculty were in

vulnerable positions in terms of the budget reduction. He stated:

> The reason fixed terms were so vulnerable was that the budget reductions had to go into effect for the new fiscal year, and that left -- if you eliminated positions, you had to . . . eliminate either fixed term or first year annual tenure people, because the ... termination time for second year people was too long ... for it to occur in that shortened calendar kind of year.
>
> (Tr. 17,261)

Dr. Barr was aware of the impact of the program reductions on women and minorities. He asserts, however, that each action followed a School of Education program review, and decisions were based on criteria as outlined earlier which were reviewed and endorsed by the faculty advisory committees. Ms. Kale claims that in her particular case only the secondary art education

program was eliminated, which involved less than 33 percent of her salary. She argues that the decision to eliminate the remaining 67 percent of her position was the result of an adverse recommendation by Dr. Tucker on the day that Dr. Tucker allegedly made the "negative energy" remark discussed at length earlier. (See Plaintiffs' Rebuttal Findings of Fact #15). The evidence simply does not support this assertion. Dr. Tucker's preliminary recommendations were not followed by Dr. Barr after his arrival. Dr. Barr instituted an entirely independent process. He testified that in addition to the program reductions, budget cuts were being made. He explained that a recommendation was made that the faculty in the department of elementary education could absorb the teaching of

art to the elementary education majors. (Tr. 17,258). Although it was recognized that it could not be done nearly as well as it had previously been done, because of the budget crisis, the decision was made to eliminate Ms. Kale's entire position. Dr. Barr testified that a member of the elementary education department faculty had agreed to teach the art classes the following fall. This was prior to the merger of the OSU School of Education with the WOSC School of Education.

After OSU had eliminated a significant portion of the School of Education program (including Ms. Kale's position), a merger was proposed between the OSU School of Education and the WOSC School of Education located about 20 miles away. The purpose of the merger was to meet and fend off future budget

crises without diminishing the quality of the education program. (Tr. 17,229). As a part of the merger between OSU and WOSC, James Kirk now teaches the art education courses formerly taught by Ms. Kale.

Undoubtedly, fixed-term positions in the School of Education were disproportionately affected by the 1982 budget cuts because they could be eliminated quickly in a time of fiscal crisis. However, this court cannot say that the processes outlined by the Board were pretexts for sex discrimination or were arrived at because the fixed-term faculty were disproportionately women. Ms. Kale has failed to prove that the elimination of her position, or any other position eliminated by the budget crisis, was influenced by the sex of the faculty member holding the position.

Ms. Kale cannot prevail on her individual claims of sex discrimination.

Kale Footnotes

1. Mr. Moeller came to OSU in 1973 without his doctorate and was terminated in 1978 because he had not finished his doctorate, despite the fact that because of his field he would be difficult to replace.

2. Mr. Moeller came to OSU five years before Ms. Kale.

3. The record contains insufficient evidence for the court to discuss this later claim.

DR. MARGARET LUMPKIN

Dr. Margaret Lumpkin, a professor of education at Oregon State University (OSU), who retired on December 31, 1984, filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) on June 3, 1981. Dr. Lumpkin claimed that she was discriminated against because of her sex in that (1) during most of the years that she and Dr. Fred Fox were at OSU, Dr. Lumpkin received a lower salary than Dr. Fox, although he was an equally qualified male performing substantially the same job as she performed; and (2) other than the last year that he taught, Dr. Albert Leeland received a higher salary than Dr. Lumpkin, even though he was a less qualified male who performed substantially the same job as she performed; and (3) when Dr. Lumpkin

accepted an early retirement agreement in 1982, she received a less favorable salary adjustment than men who were retiring at approximately the same time. She received a Right to Sue Letter from the EEOC on June 25, 1982.

Dr. Lumpkin received a B.S. degree from the University of North Carolina in 1944; an M.S. degree from Wellesley College in 1945; and a Doctor of Education degree from OSU in 1957. From 1945 to 1948 she was an instructor at the University of Virginia. In 1948 she came to OSU as an instructor in the Physical Education Department. She remained in the Physical Education Department for five years. The last year she was in the Physical Education Department she was promoted to assistant professor. Then she served as an assistant to the OSU

Dean of Women for one year (as an assistant professor) and taught at Corvallis High School the next year. In 1955 she returned to OSU as a part-time instructor in the School of Education and as a doctoral candidate. In 1957 she received her doctorate and a full-time appointment as an instructor [1] in the School of Education. She was promoted to assistant professor in 1960; to associate professor in 1966; and to professor in 1970.

Dr. Lumpkin's specialties are in the fields of psychology, adolescence, child psychology, school organization politics, and civil rights laws in the school. Dr. Lumpkin has an extensive record of scholarly work. In her early career, she wrote three articles on health and physical education. Since 1973, she has co-authored twelve refereed

articles in two or three different journals and a chapter in a book. She has assisted with two Northwest Regional Lab grants and co-authored a reference book.

SALARY CLAIMS

Dr. Lumpkin claims that because of her sex she was discriminated against in terms of salary throughout her career at OSU. However, in 1972 OSU entered into a conciliation agreement with the United States Department of Health, Education and Welfare (HEW) concerning, in part, the salaries of faculty women. A committee had been formed which studied and compared the pay of faculty men and women. As a result of that study, most women's salaries were "equalized." In fact, Dr. Lumpkin's salary was increased from $12,585 to $16,000. Dr. Lumpkin contends that from the time of the 1972

OSU-HEW conciliation agreement to the filing of this lawsuit in April, 1980, the salaries of many faculty women who were awarded increases in 1972 had slipped below their comparators. She claims she is one of those women.

Dr.Lumpkin makes no assertion that the 1972 conciliation agreement was flawed or failed to correct the problem it was intended to correct. Accordingly, the focus of this court's inquiry will be the salaries of Dr. Lumpkin and her comparators from 1972 forward.

Dr. Lumpkin claims she has received a lower salary than her comparators, Dr. Fox and Dr. Leeland. Therefore, the court must first determine whether Dr. Fox and Dr. Leeland are equally qualified males who have performed substantially the same job as Dr.Lumpkin.

Dr.Fox received a B.S. degree from Miami University of Ohio in 1942 (two years ahead of Dr. Lumpkin), an M.A. degree in science education from Ohio State University in 1949 (four years behind Dr. Lumpkin), and a Ph.D. degree in science education from Ohio State University in 1957 (the same year Dr. Lumpkin received her doctorate). From 1947 to 1956, he was an assistant professor of education at Miami University of Ohio. He came to OSU in 1957 as an assistant professor. He was promoted to associate professor in 1961 and full professor in 1966. His specialty is in the area of science education.

Former Dean of the School of Education, Dr.Sylvia Tucker, described Dr.Fox as "a magnificent human being" about whom no one, -- student, faculty,

or administration, -- said "anything but positive things." She also said he is respected nationally as a science educator. Former Assistant and Associate Dean of the School of Education, Charles Stamps, said Dr.Fox is "highly respected." Current Dean of the School of Education, Robert Barr, who came to OSU from Indiana University, said that Dr.Fox has a national reputation in science education.

In the area of teaching, Dr. Lumpkin said that her teaching abilities and those of Dr. Fox are comparable. Former Dean Tucker said that Dr. Fox's evaluations as a teacher surpass Dr. Lumpkin's. Former Assistant and Associate Dean Stamps testified that Dr. Fox has a reputation as a master teacher and as an outstanding professor and that Dr. Lumpkin's evaluations are less

favorable than his. Both Dr. Stamps and Dr. Tucker evaluate Dr. Fox higher than Dr. Lumpkin in the area of graduate education and acting as graduate student adviser.

In the area of research, Dr. Stamps ranks Dr. Fox ahead of Dr. Lumpkin, although they do entirely different kinds of research. Dr. Tucker expressed some reservations about Dr. Lumpkin's publication list, saying that her publications are in part based on the research of a colleague. Again, more importantly, Dr. Lumpkin described Dr. Fox's research as comparable to her own.

In the area of service, Dr. Lumpkin rates very high. Dr. Tucker said she is "as service oriented as any faculty member in the School of Education." The court concludes that Dr. Lumpkin rates higher in the area of service than Dr.

Fox, but that in considering all of their qualifications, including teaching and research, Dr. Fox is an equally qualified male performing substantially the same work as Dr. Lumpkin.

The court will now compare Dr. Leeland's qualifications, experience, and workload with those of Dr. Lumpkin. Dr. Leeland received a B.A. degree in 1947 (three years after Dr. Lumpkin) and an M.A. degree in 1949 (four years after Dr. Lumpkin), both from the University of Northern Colorado. He received a Doctor of Education degree in 1952 (five years before Dr. Lumpkin) from Columbia University. He came to OSU as an assistant professor in 1954 (three years before Dr. Lumpkin came to the School of Education) and was promoted to associate professor in 1960 and to professor in 1963. He specializes in the area of

elementary education. Dr. Leeland is different from Dr. Lumpkin and Dr. Fox in that he had considerable teaching experience at the elementary level before coming to OSU. Since he specializes in the area of elementary education, this practical experience is an important factor. However, in the areas of teaching, scholarly activity, and service, Dr. Leeland is not as highly respected as either Dr. Lumpkin or Dr. Fox, although he has three years more service at OSU than they do.

The salary figures from 1972-1982 for Dr. Lumpkin, Dr. Fox, and Dr. Leeland are as follows:

Year	Lumpkin	Fox	Leeland
1971-72*	12,586	14,004	17,122
1972-73	16,500	16,500	17,292
1973-74	17,230	17,100	17,892
1974-75	17,869	17,738	18,637

1975-76	20,196	20,250	20,781
1976-77	22,212	22,887	22,653
1977-78	23,409**	25,083	24,273
1978-79	25,560	26,334	24,273
1979-80	25,884	26,334	25,974
1980-81	28,125	28,305	28,053***
1981-82	29,250	33,138***	retired

(Pl. Ex. 169-A).

Average per year over period

21,711	22,515	21,695

* OSU-HEW Study
** Not including division coordinator stipend
*** Includes retirement raise

Before the court examines how salary decisions are made at OSU in order to determine whether there was sex discrimination in the setting of Dr. Lumpkin's salary, it is important to note some of the differences in these salaries: at various times each of these faculty members was paid more than

one of the others. Dr. Leeland was paid more than either Dr. Fox or Dr. Lumpkin in the first five years, probably because he had more seniority than they had. Dr. Fox was paid more than either Dr. Leeland or Dr. Lumpkin during the last five years that all three were employed. Dr. Lumpkin, although never paid more than both Dr. Fox and Dr. Leeland, exceeded each at various times (Dr. Lumpkin over Dr. Fox in 1973 and 1974; Dr. Lumpkin equal to Dr. Fox in 1972; Dr. Lumpkin over Dr. Leeland in 1978 and 1980.) Dr. Fox's 1981-82 salary and Dr. Leeland's 1980-81 salary were both affected by increases made in anticipation of their retirements and are not entirely the result of merit. Thus, the salary comparisons for the year 1980-81 as to Dr.Leeland and 1981-82 as to Dr.Fox are distorted, as is

Dr.Leeland's 1979-80 salary compared to Dr.Lumpkin's.

While Dr. Leeland's salary exceeded that of Dr. Lumpkin for the first five years, Dr. Lumpkin's salary exceeded Dr. Leeland in 1978-79. The lead was reversed the following year and reversed again in 1980-81. Over the period from 1971-72 to 1980-81, Dr. Lumpkin's salary increases were substantially more than Dr. Leeland's. The difference in salary as of 1971-72 is explained by seniority. The fact that Dr. Lumpkin's salary caught up and finally exceeded Dr. Leeland's salary is explained by the larger merit increases she received for superior performance in the areas of teaching, scholarship, and service. No inference of sex discrimination can be drawn from comparing the salaries of Dr. Lumpkin and Dr. Leeland.

Again, as to Dr. Lumpkin and Dr. Fox, their salaries remained very close once Dr. Lumpkin's 1972 equity raise took effect. The 1981-82 comparison is distorted because of Dr. Fox's retirement raise. From 1972-73 to 1980-81, Dr. Fox's salary was higher for six years; Dr. Lumpkin's salary was higher for two years; and they were even for one year. The net difference over the years is less than $400 per year.

Dr. Fox's salary began to exceed Dr. Lumpkin's in 1975-76, which is the year when Dr.Sylvia Tucker became Dean of the School of Education. Dr. Tucker testified that the salary differential in favor of Dr. Fox was based on performance and that the differentials were warranted and documented.

The court will now turn to

Dr.Tucker's general explanation for the salary decisions that she made.

Q [By Mr. Casby] And I wonder if you could describe to us what process that you engaged in, what structure was involved in deciding who got what?

A When the salary decisions were made, they were made, first of all, on the basis of the amount of money that came down to us from the university.

There was an allocation from the State Board of monies for salaries to each university, then the president and his administrative staff determine how much would be given to each school.

Within the school of education and within the other schools and colleges of Oregon State, there was a designated amount based on the number of FTE and based upon the number of students, based upon several factors. But -- but it was equitable.

The school of education got money in the same way that the other units of the -- of the university got money.

We were told what our salary allocation would be. We were given guidelines by which we were to allocate these monies.

For instance, if -- if there would be available a 7 percent, approximately a 7 percent quote raise, then we would get 7 percent of -- times the number of faculty members we had with some -- some

allocation for whatever would be deemed necessary within a unit. Science might have some special needs, business might have some special needs.

So in that case, then if there were -- if there was a 4 percent raise, across-the-board raise, then that was automatic. That would leave then 3 percent merit pay or merit pay (sic). If we had any equity raises that we wanted to work on, if we had a class of people for instance. For instance, one year all full professors, it was suggested that we pay special attention to -- to full professors who by some standards were paid lower at Oregon State than some of the major universities in the country.

If we had a 3 percent merit pay or 3 percent amount of money which we could use for the things within the -- within the school of education that were necessary, then we would -- we would allocate it, I would allocate it to the division within the school. And I would say -- we would all get together and I would say this is the money that we have and we need to keep a couple percentage points of the money or 3 percentage points for raises within the administrative staff, special merit that we deem necessary. The rest of it went to the departments or to the divisions.

The division coordinator then had the obligation to bring back to me the merit raises as she saw them. If they were 3 percent, we would on first blush say, why don't we look at 1 percent merit for

teaching, 1 percent merit for research and 1 percent for service.

Then the cord -- the division coordinator would take the evaluations from the faculty and in some cases sit down with the faculty and would say, this is how I view your performance in these areas. I'm going to recommend X number of dollars, which is -- is a percent for service, a percent for teaching. I don't see research activities on your part, so I'm not going to award that percentage point. So that with every faculty member the coordinator would act in that fashion.

With written documentation the coordinator would then bring that documentation back with the recommendations that here she was making to me, and we would sit down individually and I would listen to what the coordinator would say about why here she was recommending this particular salary raise. And --

. . .

A And then after we talked about it and there was some agreement between the coordinators and me, and also the documentation for the -- the raise was adequate, then we normally would get all the coordinators together and the rest of the administrative staff, and we would go over all of these again.

And I often would go to the Board and I would say, okay. These are the recommendations for this kind of

percentage raise, and these are the reasons why coordinator X is recommending this raise.

And in some cases it worked out to faculty members benefit when we got everybody, when we got all the coordinators and administrators together because another coordinator would say, well, gee, this person does some work with our department, too. I don't know whether you're fully aware of that. But that's the way we would do it. And sometimes we would change those to make them more equitable. And people could see that there was another little bit of salary available. And they would say, well, gee, I've a really superb person who's done outstanding research, they have gotten a couple hundred thousand dollars in grants, they have done all these things. And sometimes within the total meeting, we would -- would again change. But that's -- that's how the merit -- merit pay was -- was designated. (TR. 17,795-98)

Specifically, Dr.Tucker explained the salary differences between Dr. Lumpkin and Dr. Fox as follows:

Q [By Mr. Casby] Okay, now, I wonder if you would just indicate to us why those differences developed.

A Well, they would be the direct result of recommendations to me as dean during the early years, 1975-'76. And those determinations would have been based to the best ability of the coordinator, and

the relationship with me would be based on performance of the individual.

Q And with reference to your knowledge of -- in the area of performance, as you described it, were those differentials warranted or not?

A Yes, I believe they were. I think that any differential in salary that occurred was warranted and was documented. I kept a constant vigilance on the salary. As a matter of fact, one of the first things that I did when I went to Oregon State was to do a salary history to see where the salaries were and to see whether or not there were any gross inequities and to see whether those inequities had been corrected at some period. And I -- I kept -- I kept this long chart which -- which was the historical study, which I believe is available to -- to anyone, which -- which kept me in constant -- in a constant state of alert about the salaries.

And it becomes difficult, when the salaries are based on performance and they're documented to be so, when you see a little differential creeping in, but you -- you -- if you believe in merit pay, as I do, then those differentials will occur.

(TR. 17,828-30).

Dr. Tucker's testimony that the salary difference between Dr. Lumpkin and Dr.Fox was based upon individual

performance is a legitimate, non-discriminatory reason for the employment decision. Dr. Lumpkin offers no evidence that the offered explanation is other than credible or a pretext for discriminatory bias. While individual performance is a subjective criterion that may be offered to mask sexual bias, there is no evidence in this instance that would support that conclusion. In academic and professional employment situations, courts are reluctant to second-guess subjective decisions made by employers or to impose on a defendant the court's evaluation of the quality or merit of individual achievement. Any further action the court could take would be no more than an attempt to re-evaluate what Dr.Tucker has already evaluated on entirely permissible grounds.

Dr. Lumpkin cannot prevail on her salary claims.

RETIREMENT CLAIM

In her second claim of sex discrimination, Dr. Lumpkin contends that when she accepted an early retirement agreement, she received a less favorable salary adjustment than males who retired at approximately the same time.

Beginning about 1981, OSU faculty members nearing retirement age were offered incentives to retire earlier than they might otherwise. Early retirement plans were seen as a way for institutions faced with financial problems to save money. Higher paid older faculty could be replaced by lower paid junior faculty. The early retirement plans generally include a predetermined date for a relinquishment

of tenure and retirement by the faculty member in exchange for an immediate percentage increase in his or her base salary. The other terms of the early retirement agreement are negotiated; for example a faculty member seeking early retirement could bargain for a 600 hour per year teaching or service contract or series of contracts over an agreed number of years. During the period prior to the retirement date, the faculty member would receive any other across-the- board or merit increases awarded.

Dr. Lumpkin testified that she had learned that certain male faculty members had received retirement salary increases which exceeded her increase and the increase of other women faculty members. Dr. Lumpkin compared the retirement increases of male faculty members Gordon Anderson, Fred Fox, Glen

Clark, and Glenn Klein to the retirement increases of female faculty members Jean Severeide and Mary Jane Wall, as well as her own. The only evidence that plaintiff offered to support this claim was the testimony of Dr. Lumpkin as follows:

Q [By Mr. Willner] Dr. Lumpkin, at the same time that you entered into a retirement agreement, were there other faculty members in your department that entered into the same retirement agreement, or into a similar retirement agreement?

A There were other faculty members in our school that did.

Q All right. And what incremental benefit did you receive in return for retiring?

A I received a six percent increase on my base salary.

Q All right. And who were the other people who entered into agreements at approximately the same time and say what they received and identify which were male and which were female?

A There were four of us at the same time. Glen Clark, male.

Q And what did he receive?

A He received an aggregate 32 percent.

Q Who was the next person?

A I retired. I will be retiring. And I received an aggregate 22 percent. That is considering the three years that we are speaking of.

Q All right.

A Jean Severeid.

Q Male or female?

A Female. Retired. She received 24 percent. And Mary Jane Wall, 23 percent.

Q Is Mary Jane Wall a female?

A Yes.

Q Were there other males that retired at the same time?

A There were other males who retired approximately the same time.

Q What are their names? What are they receiving?

A Gordon Anderson. He was a professor who came in 1962. He received 40 percent. Fred Fox. It's hard to calculate. He received 17 percent one year but he's on a 600 hour appointment the last two years and he has chosen not to take that and to serve 600 hours, but his salary would have been raised so it's

very hard to com pare what would happen there.

Glen Clark, professor of education, he received a 39 percent raise. Glen Kline, professor of extension education. He received a 33 percent raise. (TR. 2807-08).

This testimony is not sufficient for the court to evaluate Dr. Lumpkin's claim. However, Dr.David B. Nicodemus, Dean of Faculty at OSC, described Dr. Lumpkin's early retirement agreement as follows:

Q [By Mr. Casby] Now, with reference to that, could you describe to us the substance of the retirement agreement with respect to Margaret Lumpkin? What I particularly -- I was just going to be more specific in that the date it was signed, in other words, when the agreement took place and the date it was to be effective, and then what monetary inducements, what monetary provisions there were in it.

A Professor Lumpkin, after the president approved it with the dean's recommendation, accepted an early retirement agreement, which would be in accordance with the institutional policy, providing her a one-time six- percent special salary adjustment to be effective for three years prior to her retirement

date. The retirement date in Margaret Lumpkin's case was chosen. She elected December 31, 1984.

Q When was --

A And so this six percent adjustment was made effective as of and I believe retroactively back to July of '82. So it would apply for the calendar years '82, '83, and '84. This was one of the conditions of the retirement agreement. (TR. 17,351).

. . .

Q [By Mr. Casby] And now that you have referred to the actual agreement, . . . can you indicate to us what other aspects there are on this agreement besides the six percent increase for a three-year period?

A The second of the retirement agreement incentives is provided -- provides for 600-hour appointments for Professor Lumpkin for two years following retirement for each of two years. (TR. 17,353).

Dr.Nicodemus described the various individual agreements as contrasted below:

FEMALE FACULTY	MALE FACULTY
LUMPKIN	CLARK
School of Education Retired 12/31/84	School of Education Retired 12/31/82

6% salary adjustment retroactive

three years; 600 hour appointment for two years after retirement.

6% salary adjustment retroactive one year and one term; 600 hour appointment for five years after retirement.

WALL
School of Education
Retired 12/31/84

6% salary adjustment retroactive three years; hour appointment five years after after retirement.

ANDERSON
College of Health & Phys Ed
Retired 9/1/82
13% salary adjustment for first year 600 600 appointment; no retro-for active adjustment; years 600 hour appointment for two years after retirement.

SEVEREID
School of Education
Retired 12/31/84
6% salary adjustment retroactive three years; 600 hour appointment for four years.

FOX
School of Education
Retired 6/30/82
13% salary adjustment '81-'82 academic year including the average faculty salary adjustment for that year of 6%.

KLEIN
No early retirement agreement with Oregon State University.

(TR. 17,351-363).

Early retirement agreements are individually negotiated between faculty

members and OSU. This accounts for the variations in the terms of the agreements. Dr. Lumpkin does not dispute the accuracy of the agreements as stated herein. A comparison of the men's and women's agreements shows that the women negotiated better agreements than the men; that is, the women received better retroactive salary adjustments than the men received.

Apparently, Dr. Lumpkin's testimony describes retirement income in terms of a percentage of salary prior to retirement. See, Testimony of Dean Nicodemus at Tr. 17,366. For example, she testified that Clark received "an aggregate 32 percent." Dr. Lumpkin presented no evidence as to how the retirement income is calculated or how the method of calculation adversely

affects women. Dr.Nicodemus testified that the retirement income for each individual is calculated by the Oregon Public Employees Retirement System, based upon a number of factors including highest average salary for three out of the last ten years of employment.

If Dr. Lumpkin's claim is that this system of calculating retirement income is sex biased, the proper defendant is not before the court, and no evidence has been presented to explain the source of the bias. If Dr. Lumpkin's claim is that OSU treated her and other female faculty members less favorably than male faculty in the terms of their individual early retirement agreements, resulting in their receiving lower retirement income than men, the evidence does not support this claim.

Dr. Lumpkin cannot prevail on her retirement claim.

Lumpkin Footnotes

1. At this time had been at OSU three years and was an assistant professor. Dr.Fox was also appointed in 1957, but as an assistant professor. Dr. Lumpkin claims that since she was appointed an instructor instead of an assistant professor in 1957, she was

always behind her comparators in obtaining rank, and this adversely affected her salary thereafter. There is no evidence before this court of the facts or circumstances surrounding Dr. Lumpkin's hiring in 1957. There is nothing to suggest that her rank at hire was discriminatory, but in any event, any salary inequities were adjusted in 1972.

OREGON HEALTH SCIENCES UNIVERSITY

PORTLAND, OREGON

Polly Ann Fisher

Ann L. Hoffstetter

Dr. Jane Siegel

POLLY ANN FISHER

Polly Ann Fisher, a part-time staff and charge nurse at St.Vincent's Hospital in Portland, Oregon, claims that she was discriminated against because of her sex while she was employed at the School of Nursing at the Oregon Health Sciences University (OHSU) in that (1) she received less pay than equally qualified men performing substantially the same job; (2) she received less satisfactory offices than equally qualified men performing substantially the same job; and (3) she received no direct pay for certain of her duties on the faculty practice plan, while equally qualified men performing substantially the same job received direct pay. Ms. Fisher intervened in this action as a named plaintiff without filing a charge of

discrimination with the Equal Employment Opportunity Commission.

Ms. Fisher received a B.S. degree from the University of Oregon School of Nursing in 1972, and a Masters Degree in nursing from the University of Washington in 1976. Before coming to OHSU in 1974, Ms. Fisher worked for a year at Dammasch State Hospital in Wilsonville, Oregon, as a staff and charge nurse. In her faculty position at OHSU, she supervised students who had no prior psychiatric nursing experience in an acute, in-patient care center. She also had research and community service responsibilities, including service on the Admissions Committee and the Student Grievance Committee. She was a member of the three-school faculty group that interviewed candidates for the presidency of OHSU.

SALARY CLAIM

Ms.Fisher has no complaint about her salary as it compares to the salaries of other faculty in the School of Nursing at OHSU. Her complaint is that she is not paid as much as faculty in the School of Medicine and School of Dentistry at OHSU.

At the end of her direct testimony, Ms.Fisher gave this testimony:

> Q [By Mr. Willner] All right, do you have any complaints about your treatment as a faculty member within the School of Nursing?
>
> A Not within the School of Nursing, no.
>
> Q And what is your -- what is the basis of your complaint about -- have you raised a complaint about your pay in this case?
>
> A Yes.
>
> Q And what is the basis for your complaint?
>
> A That as a group, nursing faculty were paid less than men with comparable responsi-

> bilities, qualifications, education in the other two schools. [Medical and dental schools.](Tr. 3758).

Ms. Fisher's claim is a comparable worth claim. She claims that nursing school faculty receive less pay than medical school faculty and dental school faculty because the nursing school faculty is composed primarily of women and the medical school faculty and dental school faculty are composed primarily of men. Ms.Fisher also claims that, in general, the School of Nursing receives less monetary assistance from the Oregon State Board of Higher Education than the medical and dental schools because the faculty and students in the School of Nursing are primarily women.

The decision in Spaulding v. University of Washington,740 F.2d 686 (9th Cir. 1984), precludes Ms.Fisher's

comparable worth claim. See Opinion and Orders of August 10, and September 13, 1984.

Insofar as Ms.Fisher attempts to prove that nursing school faculty are not treated as well by the Board as the medical school faculty and the dental school faculty, she has failed to do so. During 1978 and 1980, each school at OHSU had its budget reduced by the same percentage. (Tr. 3756). Ms. Fisher claims that this was unfair because "the School of Nursing had a disproportionately smaller amount from which to cut." (Pl. Proposed Findings of Fact No.9). However, since the nursing school's budget was smaller than the budgets of the medical and dental schools, the actual dollar amount cut from the nursing school budget was less than that cut from the budgets of the medical and dental

schools. Moreover, the budgets of the medical and dental schools were very low compared to other medical and dental schools nationwide, and the budget cuts were as damaging to the medical and dental schools as they were to the School of Nursing. In fact, by 1981 the School of Nursing was better off in comparison with nursing schools at other institutions than were the medical and dental schools in comparison with medical and dental schools at other institutions. Salaries at the School of Nursing were comparable to other schools of nursing in the western part of the United States, while the salaries at the medical and dental schools continued to be below comparable medical and dental schools in the western part of the United States.

Ms. Fisher cannot prevail on this

part of her claim.

OFFICE SPACE

Ms. Fisher claims that she was given less satisfactory office space than were men at OHSU because of her sex. The office space provided to Ms.Fisher and other nursing school faculty in Emma Jones Hall was crowded, unpleasant, and run-down. However, faculty members in the Family Practice Department in the School of Medicine were also housed in this building.(Tr.20,530). Unfortunately, OHSU has many substandard physical facilities. Significantly, however, there is no evidence that women faculty in the medical or dental schools received less adequate office space than men in those schools.

The court concludes that to the extent that nursing school faculty have received less desirable offices and other

perquisites (such as parking) than have medical school faculty or dental school faculty, the differences in treatment do not result from any sex-based discriminatory animus on the part of the Board, but rather result from differences in professional affiliation, a legitimate, non-sex-based distinction permissible under Spaulding.

FACULTY PRACTICE PLAN

Ms.Fisher's final claim involves her faculty practice plan duties. Faculty at health care institutions often spend a certain amount of time practicing in their area of expertise.Ms.Fisher worked about 360 hours a year in nursing service at University Hospital, in return for which her salary was changed from a nine-months' to a twelve-months' salary. This means that she received three months'

salary for approximately nine, 40-hour work weeks.

Ms.Fisher complains that while her responsibilities included charting the patients' progress in the "Physician's Progress Notes" section of the patients' charts, she was not allowed to bill University Hospital directly for such activities while medical school faculty were allowed to bill University Hospital directly for these activities. University Hospital pays to the Dean of the School of Nursing compensation for the services provided to University Hospital by individual nursing school faculty members. University Hospital pays no monies directly to faculty members in the School of Nursing.

There is great diversity with regards to the School of Medicine-University Hospital practice plan

arrangements. Most faculty in the School of Medicine in the clinical departments must generate a significant portion of their own salary through patient care in an in-patient as well as an out-patient setting. Fees are charged by medical school faculty for those services.Each department of the medical school handles these funds separately. In the Department of Surgery, practice plan funds are handled on an individual-by-individual basis. In the Department of Pediatrics, practice plan funds are handled through a department partnership. In some departments there may be more than one partnership.

More importantly, however, the nursing faculty from the School of Nursing who render services to University Hospital do not perform the same "services" as the physicians from the

medical school. This court rejects the notion that a physician and a nurse must be paid the same when they perform the very same activities, such as charting the patients' progress in the"Physician's Progress Notes" section of the patients' charts. As the Spaulding court noted, in determining whether jobs are substantially equal and hence must be paid the same, a court must take into account the experience, training, and responsibility required by the positions. Physicians must have more education and training than nurses, and they carry the ultimate responsibility for the well-being of their patients. The court concludes that if Ms.Fisher was paid less for her practice plan work than physicians, it was not due to the fact that she is a woman rather than a man.

It was due to the fact that she is a nurse rather than a doctor.

Ms. Fisher cannot prevail on her individual claims.

ANN L. HOFFSTETTER

Ann L. Hoffstetter, Director of Auxiliary Services, and an assistant professor at Oregon Health Sciences University (OHSU), claims that she was discriminated against because of her sex in that (1) she was denied a promotion to the position of assistant vice-president of OHSU in 1981; (2) from 1981 to the present, she has been paid less than equally qualified men who perform substantially the same job as she performs; (3) she has been provided less comfortable office space than has been provided to equally qualified men; and (4) she was not included in staff meetings attended by male administrators when she was entitled to be included. Ms. Hoffstetter intervened in this action as a named plaintiff without filing a charge of discrimination with

the Equal Employment Opportunity Commission.

Ms. Hoffstetter received a B.A. degree in business administration from Portland State University in 1968 and a masters degree in public administration from Portland State University in 1979. Between 1945 and 1965, Ms. Hoffstetter worked in the private sector in payroll and cost accounting positions in various business operations including a large printing company, Coca Cola Bottling Company, and several accounting firms. From 1965 until 1969, she worked for the Oregon State Industrial Accident Commission as a senior accountant with responsibility for investments.

In 1969, Ms. Hoffstetter became employed at OHSU as an assistant manager in the classified services in charge of the accounting office, which included

general ledger accounting for OHSU, the cashier's office, parking services, and financial aid. At various times she has managed many of the business operations of OHSU including the bookstores for the School of Dentistry and the School of Nursing, purchasing, accounts payable, the residence hall, the mail service, and other auxiliary services. She increased productivity in every area that she managed.

She was a member of the board and President of the Western Association of College Auxiliary Services, and was appointed to the board of the National Association of College Auxiliary Services. She was voted the first woman president of that national organization. Ms. Hoffstetter published an article on budgeting and budget analysis in January, 1980, and an article on the nursing

school bookstore in October, 1983. The Board does not challenge Ms. Hoffstetter's skills, talents, or personal or professional achievements.

ASSISTANT VICE PRESIDENT FOR BUSINESS MANAGEMENT POSITION

Ms. Hoffstetter first claims that she was discriminated against because of her sex in that she was denied "promotion" to the position of Assistant Vice President for Business Management in 1981. The Board claims that a decision was made not to fill the position of Assistant Vice President for Business Management because of budgetary considerations, and that this decision was made independently of Ms. Hoffstetter's qualifications, experience, and sex.

In order to understand Ms. Hoffstetter's claim, the court will first discuss some of the background information regarding OHSU. The mission of OHSU is the education of students in the health professions, the conduct of research in biomedically-related disciplines, and the provision of health care to the public through hospitals and clinics. The institution has six major operating divisions: the School of Medicine, the School of Dentistry, the School of Nursing -- each headed by a dean -- and three clinical units: University Hospital, the Crippled Children's Division, and the Dental Clinics. The University Hospital and the Crippled Children's Division are headed by administrative officers called Directors, and the Dental Clinics are

headed by the Dean of the School of Dentistry.

The Oregon State Board of Higher Education is the governing body for the OHSU, as it is for the other seven institutions in the Oregon State System of Higher Education. In carrying out the day-to-day operations of OHSU, its administrative officers have administrative decision-making authority, but they must adhere to the general rules and regulations promulgated by the Oregon State Board of Higher Education in its Administrative Rules and Internal Management Directives. The President of OHSU, as its chief executive officer, has the authority to handle all matters relating to personnel, including appointment, promotion, tenure, salary increases, and evaluations. The only exception is that the Oregon State Board

of Higher Education must approve the appointment and salary level for the president and vice-president of OHSU.

Administratively, the deans of the three schools within OHSU and the directors of the clinical units are given substantial discretion to manage the resources of their units in order to fulfill the mission of the institution. The central administration monitors the expenditures of the six major operating units, alerting the Vice President and Assistant Vice President for Budget and Finance if problems arise or appear imminent.

In April, 1980, Dr. James T. McGill was hired as Vice President for Finance and Administration, one of three vice-presidents at that time.[1] Dr. McGill assumed administrative responsibility for many functions including personnel,

physical plant, computing services, and financial offices.

In his testimony, Dr. McGill explained that when President Leonard Laster recruited him in 1980 for the position of Vice President for Finance and Administration, Dr. Laster made it clear to him, as did the deans and directors at the OHSU, that they expected the new Vice President for Finance and Administration to make significant management changes. Dr. McGill explained:

> Q [By Ms. Abernethy] And what prompted you to under take this reorganization?
>
> A When President Laster was recruiting to the Vice President for Finance and Administration, he made clear to me as one of those candidates, as did the deans and directors at the University at the time, that there was an expectation of the new person to deal with what was perceived to be several problems of a

> managerial nature. Their feelings were supplemented by a pro bono or gratis study done by Arthur Young and Company, as I recall, regarding the organization of the office of the Vice President. In short, there were several adverse audit comments of a fiscal nature, of a problematic nature, of a performance nature at that time, there were changes that needed to be made in the administration so as to make sure that expectation of managers were made clear, to make the reporting lines somewhat more pyramidal rather than as flat. The acting vice president at the time had in the neighborhood of ten, as I recall, people reporting directly to him. The consultant said that was too many for a vice president to deal with.

(Tr. 19,182).

Pursuant to the expectations of the president, deans, and directors, in June, 1980, after 2 1/2 months on the job, Dr. McGill issued to all staff a memorandum entitled "Organizational Changes," in which he established new

reporting lines within the central administration. These "Organizational Changes" called for five assistant vice-presidents. A copy of that memorandum, Defendant's Exhibit 4509, follows this page.

The five assistant vice-president positions listed in Dr. McGill's Memorandum are:

Assistant Vice President for Budget and Finance;

Assistant Vice President for Facilities Management;

Assistant Vice President for Business Management;

Assistant Vice President for Information Systems;

Assistant Vice President for Management Services.

Ms. Hoffstetter's position was listed as "auxiliary services" and she was to

Date: June 30, 1980

To: All Staff in the Office of the Vice President for Finance and Administration

From: James T. McGill

Subject: Organizational Changes

MEMO

University of Oregon
Health Sciences Center
Portland

Effective July 1, 1980, the following reporting lines are established:

Vice President for Finance & Administration	James T. McGill
Assistant Vice President, Budget & Finance	James T. McGill (Acting)
Budget Office	Richard A. Stolz (Acting)
Research Services	Abdul O. Anani
Accounting	Bruce W. Palmer
Assistant Vice President, Facilities Management	Ralph E. Tuomi
Physical Plant	Ralph E. Tuomi
Facilities Planning	Gordon H. Ranta
Security	Richard C. Anderson (Acting)
Parking	Warren E. Davis
Instrument and Safety Service	George I. Johnston

Assistant Vice President, ~~Fiscal~~ Business Management	M. R. Parelius (Acting)
circle added by the court — Auxiliary Services	Ann L. Hoffstetter
Purchasing	Shirley J. Carey
Payroll	Irene Fulmer
Business Office	Cecil B. Burt
Accounts Payable	Phyllis Seid
Animal Care	Allan L. Rogers
Inventory and Surplus	G. Marvin Stephens
Student Activities Building	Benjamin R. Jensen
Assistant Vice President, Information Systems	M. R. Parelius (Acting)
Systems Development	TBA
Technical Support	George I. Johnston (Acting)
Assistant Vice President, Management Services	M. R. Parelius
Affirmative Action	William W. Jackson
Internal Audit	Hilton A. Talbert
Personnel	Bill R. Kribs
Contracts	Howard J. Dahlstrom
Special Projects	Monte R. Mullen

Please note that this display represents the reporting relationships of existing units. The organizational structure will be under continued review and is subject to change in the future.

JTM:mjh

DEFENDANT'S EXHIBIT 4509

report to the Assistant Vice President for Business Management.

Sometime during the summer of 1980, Ralph E. Tuomi was appointed Assistant Vice President for Facilities Management and M.R. Parelius was appointed Assistant Vice President for Management Services.[2] Mr. Tuomi had been the physical plant director before the reorganization. In his new position as Assistant Vice President for Facilities Management, Mr. Tuomi was responsible for the physical plant as well as security for parking and instrument and safety services. Mr. Parelius had been the Acting Vice President for Finance and Administration prior to Dr. McGill's appointment as Vice President for Finance and Administration. After Dr. McGill was hired, Mr. Parelius returned to his prior position as Assistant Vice

President for Business Services. In that position, he held many of the responsibilities of the position of Assistant Vice President for Management Services, to which he was appointed pursuant to the June, 1980 organizational change.

While two of the five assistant vice-president positions were filled during the summer of 1980 without a search, a search had to be conducted for the new positions of Assistant Vice President for Budget and Finance, Assistant Vice President for Business Management, and Assistant Vice President for Information Systems. Dr. McGill decided to advertise first for only two of the three positions: Assistant Vice President for Budget and Finance, and Assistant Vice President for Business Management. National and local

recruiting announcements were issued for these two positions in the late summer of 1980. Ms. Hoffstetter, who was then an assistant business manager, was notified. She applied for the position of Assistant Vice President for Business Management along with Cecil Burt, Director of the OHSU Business Office, and many other applicants .

About the same time that the recruitment process had begun, first the Governor and then the Legislative Assembly of the State of Oregon ordered budget cuts within the institution. Dr. McGill, in compliance with those orders, revised his plans for administrative changes as follows: (1) He decided not to recruit at all for the position of Assistant Vice President for Information Systems. Instead, he assigned the duties of that position to Mr. Parelius, the

Assistant Vice President for Management Services. (2) He placed "on hold" the recruitment for the position of Assistant Vice President for Business Management (the position for which Ms. Hoffstetter and Mr. Burt had applied). (3) He proceeded with the recruitment for the position of Assistant Vice President for Budget and Finance because of OHSU's prioritization of budgetary and fiscal matters. Peter Wollstein was hired as Assistant Vice President for Budget and Finance in December, 1980.

In the spring or summer of 1981, Dr. McGill decided to discontinue completely the search for an Assistant Vice President for Business Management. He wrote to all of the candidates, including Ms. Hoffstetter and Mr. Burt, to inform them that the search had been discontinued. At the time he decided to

discontinue the search, the field of applicants for the position of Assistant Vice President for Business Management had been narrowed to ten applicants. Ms. Hoffstetter and Mr. Burt were among those ten.

Ms. Hoffstetter claims that she was "denied a promotion to Assistant Vice President at OHSU in 1981," because of sex discrimination. (See Plaintiffs' proposed Findings of Fact #17). In order for her to prevail on this claim, Ms. Hoffstetter must show (1) that she was qualified for the position of Assistant Vice President for Business Management; (2) that she did not receive that position; and (3) that someone else received the position. In this case, the position was never filled. There is no evidence whatsoever that the position was not filled because Ms. Hoffstetter

was an applicant. The Board's explanation that the position was not filled because of budgetary reasons is supported by the evidence.

Ms. Hoffstetter cannot prevail on this claim.

SALARY CLAIM

Ms. Hoffstetter testified that sometime in the fall of 1981, she was called into Dr. McGill's office and told that he was not going to fill the position of Assistant Vice President for Business Management, but that he was going to "promote" Ms. Hoffstetter to the position of Director of Auxiliary Services. Thereafter, Ms. Hoffstetter was appointed Director of Auxiliary Services retroactive to September 15, 1981, with an annual salary of $31,126, a substantial increase in salary. Her status as a classified employee was

changed to assistant professor, an academic rank. Ms. Hoffstetter claims that her new position as Director of Auxiliary Services encompasses the same responsibilities as the advertised, but unfilled, position of Assistant Vice President for Business Management, except at a lower rank and salary than the position of Assistant Vice President for Business Management.

In support of her claim, Ms. Hoffstetter offers the organizational chart which became effective as of September 21, 1981. See Pl. Ex. 495A, which follows this page. Ms. Hoffstetter claims that this chart is proof that as Director of Auxiliary Services, she is in "exactly the same place" she would have been had she been hired as Assistant Vice President for Business Management. Ms. Hoffstetter argues that since she is

at the same organizational level and reports to the same per son as the assistant vice-presidents, she should be paid substantially the same salary as they are paid.

In comparing the responsibilities of her new position as Director of Auxiliary Services with the responsibilities of the Assistant Vice Presidents, Mr. Tuomi, Mr. Parelius, and Mr. Wollstein, Ms. Hoffstetter testified:

> Q [By Mr. Willner] All right, now, put down the budget of each of these four people as of October, 1981.
>
> ...
>
> A $2,882,134 for Tuomi, under $2 million for Parelius, under $700,000 for Wollstein.
>
> Q All right.
>
> A $2,583,653 for Hoffstetter.
>
> Q All right, . . . the present salary of each of you.

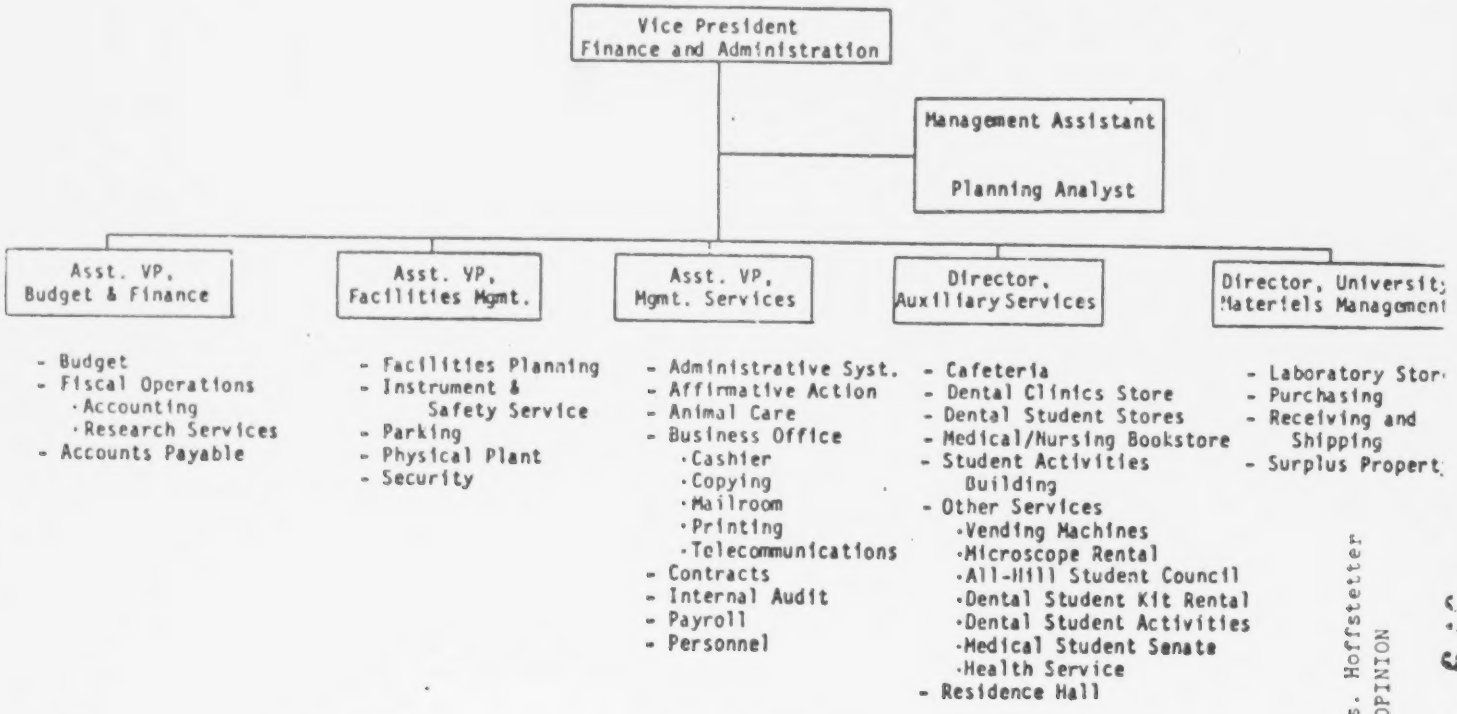
A Tuomi, $52,000; Parelius, $52,000; Wollstein, $55,000; Hoffstetter, $34,000.

(Tr. 6133).

The Assistant Vice Presidents, Mr. Tuomi, Mr. Parelius, and Mr. Wollstein, receive substantially higher salaries than Ms. Hoffstetter. Therefore, the court must determine whether the position of Director of Auxiliary Services was created as a guise for the position of Assistant Vice President for Business Management, the position for which Ms. Hoffstetter applied and which was never filled.

Dr. McGill testified on behalf of the Board that the budgetary squeeze during the summer of 1980 caused him to "rethink" the organizational plan he had proposed in June, 1980. He explained that the difference between the June 20, 1980, organizational plan and the

Organizational Structure
Vice President, Finance and Administration
Oregon Health Sciences University



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September 21, 1981, organizational plan was that there were three assistant vice-presidents in the September 21, 1981, plan rather than the five assistant vice-presidents contemplated by the June 20, 1981, plan. The responsibilities of the position of Assistant Vice President for Information Systems, which had never been advertised and had never been filled, were assigned to Mr. Tuomi, the Assistant Vice President for Management Services. That left unassigned the responsibilities of the position of Assistant Vice President for Business Management, which had been advertised but had never been filled. The question is: Did Ms. Hoffstetter assume substantially all of those responsibilities as Director of Auxiliary Services or were those responsibilities parcelled out to others as well as Ms. Hoffstetter.

The responsibilities proposed for the position of Assistant Vice President for Business Management in the June, 1980, organizational chart are:

Auxiliary Services

Purchasing

Payroll

Business Office

Accounts Payable

Animal Care

Inventory and Surplus

Student Activities Building

Dr. McGill testified that when the position of Assistant Vice President for Business Management was not filled, the duties proposed for that position were assigned as follows:

Auxiliary Services - to the Director of Auxiliary Services, Ms. Hoffstetter

Purchasing - to the Director of Materials Management (new position to be filled)

Payroll - to the Assistant Vice President for Budget and Finance, Mr. Wollstein

Business Office - to the Assistant Vice President for Management Services, Mr. Parelius

Accounts Payable - to the Assistant Vice President for Budget and Finance, Mr. Wollstein

Animal Care - to the Assistant Vice President for Management Services, Mr. Parelius

Inventory and Surplus - to the Assistant Vice President for Management Services, Mr. Parelius

Student Activities Building - to the Director of Auxiliary Services, Ms. Hoffstetter

The above listing shows that of the duties originally proposed for the position of Assistant Vice President for Business Management (the position for which Ms. Hoffstetter applied), Ms. Hoffstetter, as Director of Auxiliary Services, was only assigned "Auxiliary Services" and "Student Activities Building." Even then, however, Dr.

McGill testified that he removed Shipping and Receiving, Mail Room, Communications and Paging, and Research Stores from the Auxiliary Services duties assigned to Ms. Hoffstetter as Director of Auxiliary Services.

Dr. McGill also added to the Director of Auxiliary Services position some other auxiliary services-type duties that were not included in the June 30, 1980, organizational chart. These were Health Services, Student Activities Building, Student Government Accounts, Microscope Rental Account, and some smaller budgetary activities.

In summary, after budget reductions aborted the 1980 organizational plan, another organizational plan was developed in September, 1981. In the second organizational plan, there were three assistant vice-presidents. The duties of

the proposed Assistant Vice President for Information Systems were assigned to Mr. Tuomi; the responsibilities for the Assistant Vice President for Business Management were assigned to Mr. Tuomi, Mr. Woolstein, Ms. Hoffstetter, and to a Director of Materials Management, who was hired later. Furthermore, before the 1981 reorganization, the budget for which Ms. Hoffstetter was responsible was $1,023,451. After the 1981 reorganization, it was $981,214. Prior to the reorganization, Ms. Hoffstetter was responsible for 41.25 FTE positions. After the 1981 reorganization, she was responsible for 26 FTE positions. Ms. Hoffstetter does not challenge the accuracy of these figures. Dr. McGill prepared a chart showing the responsibilities in monetary terms between Ms. Hoffstetter and the assistant

vice-presidents for the fall of 1981 and the spring of 1982. A copy of that chart follows this page.

Finally, Ms. Hoffstetter argues that the effect of Dr. McGill's action in abolishing the position of Assistant Vice President for Business Management and creating the positions of Director of Auxiliary Services and Director of Materials Management is simply to create two lower paying positions filled by women. Ms. Hoffstetter points out that the combination of her salary and the salary for the Director of Materials Management is substantially more than the salary would be for the Assistant Vice President for Business Management position. Dr. McGill testified as follows:

> Q [By Mr. Willner] I will ask you a new question. The combined salary of Miss

Comparison of Responsibilities

	Hoffstetter Fall, 1981	Hoffstetter Spring, 1982
Hoffstetter		
xiliary Services	$1,023,451	$981,214
Operations	$3,559,344	$2,274,386
Total	41.25	26.00
ETE		

udget and Finance — Wallstrom

Operations	$ 700,163	$ 1,244,761
Total	$ 700,163	$ 3,687,013
FTE	34.50	62.50

cilities Management — Pete Tuomi

Operations	$ 13,919,977	$ 13,919,977
Total	$ 17,059,022	$ 17,059,022
FTE	165.00	165.00

6-3-9

nagement Services Panelists		
Operations	[5/] 4,988,855	[#] 4,467,517
Total	[#] 5,498,617	[4] 5,799,781
FTE	145.56	120.31

Hoffstetter and Miss Stockinger [Director of Materials Management] was about $66,000. The salary of the Assistant Vice President for Business Management was advertised in the range of 40,000. Your comtemplation was paying about 41,000? Your advertisement gave that person responsibility for both auxiliary services and materials management. I want you to tell me again why it's a savings of money to hire two people for 66,000 instead of one person for 44,000?

A There was not a hiring of two persons. There was a hiring, as it turned out, of one new person that is the Director of Material Management. Miss Hoffstetter was already in the University and hence her salary did not represent any additional dollars other than the six per cent salary increase she received in September of 1981.

Q Did you testify in your direct examination that you were thinking about creating an additional position of assistant to the assistant vice president to focus on materials management?

A I testified yesterday that it had been my expectation that with the arrival of the

> Assistant Vice President for Business Management and as that part of the organization evolved that it would likely require the addition of yet another staff person in that organization probably having to do with material management therefore creating yet another new position.
>
> Had that evolved, had that evolved along that pattern, there would have been two new positions, the Assistant Vice President for Business Management and another manager under that person.

(Tr. 19,355-356).

The court concludes that the position of Director of Auxiliary Services is not comparable with the positions of assistant vice-president.

Ms. Hoffstetter cannot prevail on her salary claim.

OFFICE SPACE

Ms. Hoffstetter claims that she was discriminated against because of her sex in that she was assigned to office space

far less comfortable than that provided to the assistant vice-presidents. Ms. Hoffstetter testified that the assistant vice-presidents had large windowed, carpeted, private offices with adjacent secretarial areas. She explained that after she was appointed Director of Auxiliary Services, she shared a 12'x18' space next to the loading dock with three other women, including her secretary. (Tr. 6127).

Dr. McGill testified that in September, 1981, he expressed to Ms. Hoffstetter his desire to find new office space for her and the Director of Material Management which he intended to hire. He testified that space became available in the immediate area of the administrative offices of the university in the summer or fall of 1982 and that Ms. Hoffstetter was given a new,

carpeted office at that time. (Tr. 19,268).

In light of the court's finding that the position of Director of Auxiliary Services is not comparable to the positions of assistant vice-president, Ms. Hoffstetter cannot prevail on this claim. While the facts show that Ms. Hoffstetter's office space was not comparable to the assistant vice-presidents, there is no indication that the delay in assigning Ms. Hoffstetter new office space was because of her sex or that she received less favorable treatment than others in comparable positions. Furthermore, the evidence indicates that many faculty at OHSU have inadequate office space.

Ms. Hoffstetter cannot prevail on her office space claim.

STAFF MEETINGS

In her final claim of sex discrimination, Ms. Hoffstetter contends that because of her sex, she was not included in staff meetings attended by male administrators. Ms. Hoffstetter testified that Dr. McGill had staff meetings for those people directly responsible to him. She explained to the court that she was not invited to the "all-male staff meetings" (Tr. 6128) until Dr. Frances Storrs, a female medical doctor, complained to President Laster about both Ms. Hoffstetter's salary and the staff meetings. (Tr. 6128). Ms. Hoffstetter testified that as a result of the complaint she was able to attend staff meetings. (Tr.6129).

Dr. McGill testified that initially he met with the three assistant vice-presidents. He explained that these meetings were part of continual efforts

to put into place a management structure for OHSU that was going to resolve some of the serious administrative problems, particularly in light of the budget cuts OHSU was experiencing. Dr. McGill felt that the initial meetings with the three assistant vice-presidents were necessary to build the assistants as a team. (Tr.19,370). Dr. McGill maintained that as that team solidified, there came a time when he wanted to add people to the meetings. It was at that point that Ms. Hoffstetter, as Director of Auxiliary Services, was included, as well as others who reported directly to Dr. McGill. (Tr.19,371). Dr. McGill maintained that the letter of complaint regarding Ms. Hoffstetter sent to President Laster did not influence his decision to include Ms. Hoffstetter.

Apparently, Dr. McGill met in a group with the three assistant vice-presidents who reported to him, but met individually with the Directors of Auxiliary Services and Materials Management, who also reported to him. The three assistant vice-presidents had responsibilities for the institution's budget, the institution's facilities and security, and the institution's personnel and payroll. Ms. Hoffstetter was in charge of the institution's auxiliary services. This court cannot say that it was unreasonable that Dr. McGill chose to meet with the three assistant vice-presidents without inviting Ms. Hoffstetter to attend. Dr. McGill was a totally credible witness. The court is satisfied that sex discrimination had nothing to do with his decisions regarding staff meetings.

Ms. Hoffstetter cannot prevail on her staff meetings claim.

Ms. Hoffstetter Footnotes

1. In November, 1982, OHSU President Leonard Laster reorganized the administrative structure of the OHSU naming Dr. McGill as the only vice president and the chief operating officer. While Dr. McGill was thereafter responsible for all day-to-day operational matters, Dr. Laster made the policy decisions which Dr. McGill implemented.

2. Dr. McGill did not conduct searches before appointing Mr. Tuomi and Mr. Parelius. After consulting with the OHSU affirmative action officer, Dr. McGill decided that Mr. Tuomi and Mr. Parelius were not receiving new "jobs," but were basically performing their same jobs with some additional duties and new titles. As such, a search was not required.

DR. JANE SIEGEL

Dr. Jane Siegel, a research associate professor in the Division of Immunology, Allergy, and Rheumatology in the Department of Medicine at the Oregon Health Sciences University (OHSU), alleges that she was discriminated against on account of her sex in that (1) she was denied an affiliate appointment with the Department of Microbiology and Immunology in 1976; and (2) she has been consistently "placed on soft money, fixed-term appointments." Dr. Siegel intervened in this action as a named plaintiff without filing a charge of discrimination with the Equal Employment Opportunity Commission.

Dr. Siegel received a B.A. degree in zoology from Pomona College, Claremont, California, in 1952, and an M.A. degree in zoology from the University of

Wisconsin, Madison, Wisconsin, in 1954. She received a Ph.D. degree in experimental pathology and biochemistry from OHSU in 1976. Prior to coming to OHSU as a research associate, Dr. Siegel was a research assistant in the Department of Zoology and Biochemistry at the University of Wisconsin (two years); a project associate in the Department of Physiological Chemistry at the University of Wisconsin (four years); a fellow at the Norsk Hydros Institute for Cancer Research in Oslo, Norway (part of a year); and a research assistant in the Department of Biochemistry at the University of California (two years).

Dr. Siegel came to OHSU in 1964. From 1964 until 1967, she was a research associate without academic rank in the Department of Pathology at the OHSU. From 1967 to 1976, she was a research

associate without academic rank in the Division of Immunology, Allergy, and Rheumatology at the OHSU. In 1976, when Dr. Siegel received her Ph.D. degree, she applied for and received an appointment as an assistant professor, an academic rank in the Division of Immunology, Allergy, and Rheumatology. From 1976 to 1979 she was an Alpha Omicron Pi fellow of the Arthritis Foundation within the Division of Immunology, Allergy, and Rheumatology. She was promoted to associate professor in this Division in 1979.

Dr. Siegel has authored or coauthored 61 refereed articles in addition to 54 abstracts. She is a member of many scientific and professional organizations, including the American Association for Immunologists

and the American Association for Cancer Research.

DENIAL OF AFFILIATE APPOINTMENT

In 1976, as the time neared for the completion of her Ph.D. degree, Dr. Siegel applied for a position with academic status in the Division of Immunology, Allergy, and Rheumatology, where she had worked as a research associate for nine years. The Division of Immunology, Allergy, and Rheumatology is a part of the Department of Medicine. The Department of Medicine is a clinical department.

Within the School of Medicine there are two general types of departments: (1) clinical departments and (2) basic science departments. Both departments teach medical students. The basic science departments teach the first and second year medical students such basic

science classes as anatomy, physiology, and chemistry, and have responsibility for graduate teaching and the training of Ph.D. degree candidates. Clinical departments teach and train the third and fourth year medical students, interns, residents, and medical fellows in actual medical diagnosing and patient care. Dr. Siegel explained:

> For the most part, the clinical departments are populated by M.D.'s, and for the most part the basic sciences are populated by Ph.D.'s. But within each, there are also small subpopulations of the other group.

(Tr. 7,339).

In general, funds appropriated by the Legislative Assembly from state revenues for salaries and support funds are prioritized by OHSU for those with M.D. degrees teaching in clinical departments and for those with Ph.D.

degrees teaching in the basic science departments. Legislatively appropriated funds are known as "hard money." Since Dr. Siegel is a research person in a clinical department rather than a teacher in a basic science department, and since she has a Ph.D. degree rather than an M.D. degree, her salary and other monetary support comes from money generated by gifts, grants, and contracts. Money from gifts, grants, and contracts is known as "soft money."

It is preferable to have a position funded with hard money. A faculty member on soft money has to apply continually for gifts or grants or contracts, which takes time away from research and other creative and scholarly activities. The process of obtaining soft money is highly competitive and the success rate is low. When Dr. Siegel

received a position with academic rank in the Division of Immunology, Allergy, and Rheumatology, she did not have a financially secure position as a faculty member, and she knew it.

The head of the Division of Immunology, Allergy, and Rheumatology, Dr. Bernard Pirofsky, had explained to Dr. Siegel that because she had a Ph.D. degree rather than an M.D. degree and because her appointment was to a clinical department rather than a basic science department, hard money support for her salary was exceedingly limited. Dr. Pirofsky told her that her academic future depended upon obtaining a primary appointment in a basic science department and that her appointment in the Division of Immunology, Allergy, and Rheumatology was restricted in that she probably would never be able to obtain

either advancement, funding, or stability. Dr. Siegel does not claim any sex discrimination in her appointment or her funding with the Division of Immunology, Allergy, and Rheumatology. Dr. Siegel testified:

> [O]ne of the problems with a Ph.D. falling within the realm of a clinical department is that they are generally and categorically non-tenure track and on soft money, I think unrelated to sex.

(Tr. 7340).

Since Dr. Siegel knew that the Division of Immunology, Allergy, and Rheumatology would not accept responsibility for funding her salary, she applied for an "affiliate appointment"[1] with the Department of Microbiology and Immunology, which is a basic science department [as opposed to a clinical department] where those with Ph.D. degrees [as opposed to M.D.

degrees] teach the basic science classes to first and second year medical students and students working toward higher degrees in one of the basic sciences. This application for affiliate appointment to a basic sciences department, the Department of Microbiology and Immunology, was in conjunction with her assistant professor position in the clinical department.[2]

Dr. Siegel considered this application for an affiliate appointment as a "first step" to an eventual primary appointment in some basic science department. In addition, an affiliate appointment would allow Dr. Siegel to obtain graduate faculty status which is extremely important for professional advancement. Dr. Siegel testified as follows:

Q [By Ms. Abernethy] And the importance of graduate faculty status to you is the opportunity to teach graduate students; is that about the sum of it?

A It's the opportunity to teach graduate students and more importantly to train graduate students in a laboratory situation. And in fact have them as junior colleagues in carrying out your research program. Because in fact research is -- is very labor intensive and brain intensive. And these young students are smart and able and ambitious and hard working and I think most faculty members that are actively engaged in research depend to a very large extent on the assistance of these individuals.

So really the deprivation of these students has a major impact on one's own research career.

(Tr. 7,403-404).

Dr. Siegel was denied an affiliate appointment in the Department of Microbiology and Immunology. She claims the denial was because she is a woman.

The Board contends that Dr. Siegel's request for an affiliate appointment was denied because she had not shown sufficient interest in the activities of the Department of Microbiology and Immunology to indicate the possibility of collaboration in the Department's particular area of scholarship, and that Dr. Siegel's interest in experimental pathology and immunology did not fulfill a specific need of that Department. The Board also contends that Dr. Siegel's claim is time-barred. The court must address the last issue before it addresses the merits of Dr. Siegel's claim.

For the purposes of an intervenor-plaintiff, such as Dr. Siegel, who did not file charges with the EEOC or the Oregon Bureau of Labor, the court has previously ruled that this lawsuit

involves only those allegedly discriminatory actions occurring after July 21, 1979. See infra, Law Applicable to Named Plaintiffs' Claims p. 5. The decision to deny Dr. Siegel an affiliate appointment in the Department of Microbiology and Immunology in 1976 is a discrete act made at a particular point in time similar to a denial of tenure or a termination and does not constitute a continuing violation, such as a salary claim. The denial of Dr. Siegel's application for an affiliate appointment did not occur within the relevant time period. Therefore, the court need not address the merits of her claim, because she cannot prevail on this claim even if it is meritorious. It is time-barred.

SOFT MONEY/HARD MONEY

Dr. Siegel next contends that she has been discriminated against because

of her sex because she has been "placed" on soft money, fixed-term, non-tenurable appointments. The Board asserts that (1) Dr. Siegel's position continues to be funded by soft money and therefore is fixed-term and non-tenurable because hard money funding in her clinical division goes to support the salaries of those individuals (men or women) with M.D. degrees; and (2) Dr. Siegel was aware when she accepted her appointment in the Division of Immunology, Allergy, and Rheumatology that she would not be funded by hard money, and Dr. Siegel admitted that sex was not a factor in this process. (See infra, p.4 - Dr. Siegel).

In support of her individual claim, Dr. Siegel presented evidence that: (1) the per capita allocation of hard money to male faculty is approximately

$22,000, while the per capita allocation of hard money to female faculty is approximately $13,000, (Pl. Ex.1278); (2) 55% of female faculty at OHSU have their entire salaries paid by soft money, while only 20% of the male faculty have their entire salaries paid by soft money; (3) at the rank of full professor the average amount of hard money dollars received by women is $17,000, while the average amount of hard money dollars received by men is $31,000; (4) at the rank of associate professor, the average amount of hard money dollars received by women is $4,000, while the average amount of hard money dollars received by men is $19,000; (5) at the rank of assistant professor, the average amount of hard money dollars received by men and women is similar, that amount being somewhere between $9,000 and

$10,000, (Pl. Ex.30); (6) during the period from 1979 to 1981, 30% of women with Ph.D. degrees at the OHSU lost their soft money, fixed-term, non-tenured positions as the result of the loss of soft money; (Pl. Ex.850-a).

As addititional support for her individual claim that she has been discriminatorily "placed" on soft money, Dr. Siegel compares herself to four male immunologists with Ph.D. degrees who have hard money positions: (1) Dr. Wesley Bullock, School of Dentistry; (2) Dr. Charles Faust, a joint appointment in the Department of Biochemistry and in a clinical department; (3) Dr. Gerrie Lesley, Department of Microbiology and Immunology; and (4) Dr. Marvin Rittenburg, Department of Microbiology and Immunology. Dr. Siegel claims that these four men made the transition from

soft to hard money and as of 1981-82 were earning almost their entire salaries on a hard money, state budgeted basis. (See Pl. Ex.838, 839; Plaintiffs' Findings of Fact No.12).

Dr. Siegel's analysis of the per capita distribution of hard and soft money to faculty with Ph.D. degrees illustrates little about discrimination concerning Dr. Siegel herself. The validity of the evidence regarding the per capita distribution is questioned by the Board's testimony that at OHSU tenured faculty or faculty on tenure track are often supported by grant funds (soft money) at various times. For the years they receive grant funds, tenured or tenure track people are statistically identical to people like Dr. Siegel who are funded by grants, gifts, and contracts. While the court has

considered this general statistical evidence, the court's conclusion in Dr. Siegel's case rests on the particular facts of Dr. Siegel's employment.

Dr. Siegel admits that faculty with Ph.D. degrees who are in clinical departments generally hold fixed-term, non-tenurable contracts on soft money. The reason is not related to sex, but to the necessity for having faculty with M.D. degrees supervise the third and fourth year medical students. Dr. Siegel also acknowledges that faculty with Ph.D. degrees who are in basic science departments generally are on hard money. Dr. Leslie and Dr. Rittenburg have primary appointments in the Department of Microbiology and Immunology, a basic science department in the School of Medicine. Dr. Bullock has a primary appointment in the Department of

Microbiology and Immunology, a basic science department in the School of Dentistry. Dr. Faust has a joint appointment[3] in the Department of Biochemistry, a basic science department, and a clinical department. It follows that Dr. Leslie, Dr. Rittenburg, Dr. Bullock, and Dr. Faust would have hard money positions.

The only person with a Ph.D. degree who has a primary appointment in a clinical department and whose salary is funded by hard money is a woman. Dr. Siegel testified as follows:

> Q [By Ms. Abernethy] Do you know of any tenured Ph.D.'s or tenure track Ph.D.'s with a primary appointment in a clinical department?
>
> A Yes.
>
> Q Who?
>
> A Dr. Virginia Weimer.

(Tr. 7,392).

To the extent that Dr. Siegel's claim is that she did not receive a primary appointment in a basic science department, the evidence is uncontradicted that she did not apply for such a position. To the extent that Dr. Siegel's claim is that she did not receive a transfer[4] to a basic science department, Dr. Siegel did not apply for a transfer to a basic science department. To the extent that Dr. Siegel's claim is based upon the 1976 denial of her request for an affiliate appointment in the Department of Microbiology and Immunology, a basic science department, it is time-barred. To the extent that Dr. Siegel claims that within the relevant time period the Board engaged in further actions which prevented her from making the transition from soft to hard money funding, those actions are not

identified, and there is no evidence in the record to support such a claim.

Dr. Siegel was advised before she applied for and accepted a faculty position in the Division of Immunology, Allergy, and Rheumatology that she was responsible for generating the funding for her own salary and that the Division could not guarantee her salary. Her salary came from soft money because she held a Ph.D. degree in a clinical department where the M.D. degree reigns supreme.

Dr. Siegel cannot prevail on her soft money/hard money claim.

INTRODUCTION TO THE CLASS CLAIM

In addition to their 22 individual claims, the plaintiffs have also alleged that the Board has engaged in a pattern or practice of treating female faculty members less well than male faculty members because of their sex. While the law gives substantial guidance to trial courts on how to analyze and decide individual disparate treatment claims, the law is less clear as to precisely what kind of proof is sufficient to show a patter nor practice of discrimination against an entire class. Moreover, the method of proving a pattern or practice class action differs from that of individual cases.

The label "pattern or practice" which has been applied to class actions under Title VII comes from language in 42

U.S.C.[2C]2000e-6(a), which provides:

> "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described. (Emphasis added).

Although this statute does not provide explicitly for a private right to file a pattern or practice class action, the

Supreme Court has indicated that private citizens have the right to file pattern or practice class actions, See, Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), and that the same rules of law concerning evidentiary proofs shall apply in both private and government actions. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358-60 (1977).[1] The Teamsters case sets out the framework for proving and analyzing pattern or practice class actions such as this one.

Teamsters involves a claim that a trucking company practiced systemwide discrimination against black people and people with Spanish surnames with respect to hiring, assignment, and promotion, and in particular that the trucking company discriminated against black people and people with Spanish

surnames by giving higher paying, more desirable line-driver and long-haul positions to white people. In Teamsters, the Court discussed both (1) the manner in which pattern or practice cases should be proved and (2) the effect of a finding of pattern or practice liability on the ability of an individual employee to obtain relief.

As to the method of proof in pattern or practice cases, the Court began by noting:

> "The government's theory of discrimination was simply that the company . . . regularly and purposefully treated Negroes and Spanish-surnamed Americans less favorably than white persons. . . . The ultimate factual issues are thus simply whether there was a pattern or practice of such disparate treatment and, if so, whether the differences were "racially premised." [citation omitted].

431 U.S. at 335. Both the language of

section 2000e-6(a) and the language quoted above indicate the need for a plaintiff to prove that the pattern or practice of disparate treatment was purposeful or intentional. In order to prove the pattern or practice case,

> "[t]he Government bore the initial burden of making out a prima facie case of discrimination. [Citations omitted]. And, because it alleged a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure--the regular rather than the unusual practice."

Id. at 336 (footnote omitted) (emphasis added). In support of its case, the government offered statistical evidence showing that a mere handful of black

people and people with Spanish surnames were in line-driver positions, and that the great majority held the lower paying, less desirable positions. Added to the statistical proof was anecdotal testimony of specific instances of discrimination:

> The Government bolstered its statistical evidence with the testimony of individuals who recounted over 40 specific instances of discrimination. Upon the basis of this testimony the District Court found that "[n]umerous qualified black and Spanish-surnamed American applicants who sought line-driving jobs at the company over the years, either had their requests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered and hired on the same basis that whites were considered and hired." Minority employees who wanted to transfer to line-driver jobs met with similar difficulties.[19]

Footnote 19 states:

Two examples are illustrative:

> George Taylor, a Negro, worked for the company as a city driver in Los Angeles, beginning late in 1966. In 1968, after hearing that a white city driver had transferred to a line-driver job, he told the terminal manager that he also would like to consider line driving. The manager replied that there would be "a lot of problems on the road . . . with different people. Caucasian, et cetera," and stated: "I don't feel that the company is ready for this right now. . . . Give us a little time. It will come around, you know." Mr.Taylor made similar requests some months later and got similar responses. He was never offered a line- driving job or an application.
>
> Feliberto Trujillo worked as a dockman at the company's Denver terminal. When he applied for a line-driver job in 1967, he was told by a personnel officer that he had one strike against him. He asked what that was and was told: "You're a Chicano, and as far as we know, there isn't a Chicano driver in the system."

Id. at 338. These illustrative examples

involve situations where evidence of intent to discriminate because of race is readily apparent. Hence, these examples bolstered the inference of discrimination created by statistics, and made it easier for the Teamsters Court to conclude that a pattern or practice of purposeful racially-premised discrimination had been proved. However, the Court hinted in Teamsters, 431 U.S. at 399, and explicitly stated in a later case that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977).

Once a plaintiff in a pattern or practice case has made a prima facie showing,

"[t]he burden then shifts

> to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the [plaintiff's] proof is either inaccurate or insignificant. An employer might show, for example, that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination, or that during the period it is alleged to have pursued a discriminatory policy, it made too few employment decisions to justify the inference that it engaged in a regular practice of discrimination.

Teamsters, 431 U.S. at 360 (footnote omitted). The employer's defense must "be designed to meet the prima facie case of the [plaintiff]"; the employer has the burden "to provide a non discriminatory explanation for the apparently discriminatory result." Id. at 361, n. 46. The burden shifts to the employer at this point because

> "[a statistical] imbalance is often a telltale sign of purposeful discrimination;

> absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. (Emphasis added).

Id. at 339 n. 20. The Court again uses the word "purposeful"; statistically disparate results are alone insufficient unless they can support an inference of purposeful discrimination.

If a plaintiff in a pattern or practice case makes a showing that an employer has engaged in a pattern or practice of discrimination, the court may award prospective relief, such as injunctive relief; may require the employer to adopt an affirmative action plan; or may require that the employer keep records of its employment decisions and report to the court. Id. at 361.

In the initial "liability" stage of a pattern or practice suit, however, "the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." Id. at 360. Rather, matters of individual remedy are to be taken up at a second stage of trial. The fact that an employer may in general practice illegal discrimination does not necessarily mean that every protected employee has suffered damage from the practice.

The second stage of trial, the "remedial" or "damage" stage, involves such individual determinations. However, unlike an individual disparate treatment action, where the plaintiff carries the ultimate burden of persuasion, in the remedial stage of a pattern or practice

case, the burden is on the employer to show that individual class members were not the victims of discrimination.

> By "demonstrating the existence of a discriminatory hiring pattern and practice" the plaintiffs had made out a prima facie case of discrimination against the individual class members; the burden therefore shifted to the employer "to prove that individuals who reapply were not in fact victims of previous hiring discrimination."

Id. at 359, quoting Franks, 424 U.S. at 772. The burden is on the employer because "proof of the pattern or practice supports an inference that any particular employment decision . . . was made in pursuit of that policy." Id. at 362.

In this class action claim, plaintiffs bear the burden of proving that the Oregon State Board of Higher Education has engaged in a pattern or

practice of intentionally treating female faculty less well than male faculty because of their sex. Plaintiffs may only prevail by establishing that sexual discrimination is the Board's "standard operating procedure -- the regular rather than the unusual practice." Id. at 336. Plaintiffs' statistical evidence is the foundation for this claim, although the court will also evaluate other evidence presented as it may bolster or detract from the statistical evidence. Plaintiffs' statistical evidence must show a sufficient disparity between the treatment of male and female faculty members from which the court can conclude (1)that differences in treatment of male and female faculty members are the "regular rather than the unusual practice" of the Board and (2)that these differences result from a discriminatory

motive. "Proof of discriminatory motive is critical, although it can in some instances be inferred from the mere fact of differences in treatment." Id. at 335 n 15.

The course that the court will follow in regard to the class action claim will be to evaluate the statistical evidence before it, keeping in mind the court's rulings in the named plaintiffs' cases, as well as the other evidence. Then the court will determine the ultimate factual issue in the class action claim: Whether plaintiffs have "establish[ed] by a preponderance of the evidence that [sexual] discrimination was [the Board's] standard operating procedure -- the regular rather than the unusual practice." Id. at 336.

INTRODUCTION - CLASS CLAIM FOOTNOTE

1. One crucial difference between private rights and governmental rights remains, however: In an action brought by the government, compliance with the requirements of Fed. R. Civ. P.23, governing class actions, need not be shown. General Telephone Company of the Northwest v. EEOC, 446 U.S. 318 (1980). Private litigants must, however, show compliance with Rule 23; compliance is not presumed or waived as in the case of a government action. General Telephone Company of the Southwest v. Falcon, 457 U.S. 147 (1982).

COURT'S EVALUATION OF THE STATISTICAL EXPERTS

The class action portion of this case is based primarily on statistical evidence. The statistical evidence upon which the court must rely in resolving the class action issues was presented by expert witnesses retained by the parties. To a great extent, these expert witnesses have had to educate the court in the application and use of statistics in Title VII cases, and, in general, the court must rely on one set of experts or the other in areas in which they disagree. When experts disagree, a court must also rely upon its own notions of the soundness and logic of their various positions. In determining upon which set of experts to rely, the court must also evaluate and consider the backgrounds, credibility, and biases of the expert

witnesses in weighing their testimony. Plaintiffs' primary expert witnesses are Dr. Mary Gray, Dr. Fred Ramsey, and Dr. Barbara Bergmann.

Dr. Gray is a professor of mathematics, statistics, and computer science at American University in Washington, D.C. She has published a number of articles dealing with statistics and employment discrimination, including some involving institutions of higher education. She is or has been President of the Women's Equity Action League, which has partially funded the present case and is or has been active in the American Association of University Professors, a college teachers union. She has participated in a number of employment discrimination cases, primarily on behalf of plaintiffs; however, she has not previously

testified as an expert on statistical matters.

Dr. Fred Ramsey is an associate professor of statistics at Oregon State University. Dr. Ramsey's professional experience has been primarily in the area of the application of statistics to the field of biology. Except for one other sex discrimination case, he has had no experience in the application of statistics to employment discrimination cases.

Dr. Barbara Bergmann is a professor of economics at the University of Maryland. She has published a number of articles involving employment discrimination and the application of statistics to employment discrimination cases. She has testified as an expert in a number of other cases, all on behalf

of plaintiffs or the Equal Employment Opportunity Commission.

The Board's leading expert is Dr. Bernard Siskin, a former professor of statistics at Temple University. He is pres ently the senior research statistician at the Center for Forensic Economic Studies in Philadelphia, Pennsylvania. He is one of the nation's leading experts on the application of sta tistics to Title VII cases. He has published widely in the area. He has testified as an expert witness in some 50 cases, and has participated to some degree in approximately 200 cases. A number of these cases have involved institutions of higher education as defendants. Dr. Siskin has been retained by plaintiffs 60 to 70 percent of the time.

Dr. Joan Haworth, another of the

Board's experts, is an associate professor of economics at Florida State University. She has done substantial research and publication in the area of economics, statistics, and employment discrimination. She has testified as an expert in twelve employment discrimination cases and consulted in 20 more, including a number involving institutions of higher education. In five or six of these cases, Dr. Haworth was retained on behalf of plaintiffs.

Dr. Finis Welch, also retained by the Board, is a professor of economics at the University of California Los Angeles and the president of a consulting firm specializing in economics and statistics. He has also published in this area, and has testified as an expert in a number of cases.

Dr. Paul Meier is a professor of

statistics at the University of Chicago. He has testified in employment discrimination cases, including several involving higher education. He has consulted in several others on behalf of plaintiffs.

The Board's experts, unlike plaintiffs' experts, show no pattern of having previously testified primarily for either plaintiffs or defendants in employment discrimination cases. Because the Board's experts have testified for both employers and employees in such cases and because, as nationally recognized experts, they may be expected to do so in the future, they have personal and economic, as well as legal and ethical reasons not to "stretch" statistical or economic theory in their testimony solely to benefit this particular defendant in this particular

case. Although plaintiffs brought out the size of the fees paid to the Board's experts, in order for these experts to continue to generate such fees, they must maintain their credibility. In fact, the Board's experts have been and are currently aligned against one another in other employment discrimination cases. In contrast, plaintiffs' experts are either individuals such as Dr. Ramsey who are unlikely to testify in other sex discrimination cases or individuals who have consistently testified only for plaintiffs.

Another important consideration for the court in weighing and judging the credibility of the expert witnesses is the directness and forthrightness with which they responded to questions put to them on cross-examination. Of

plaintiffs' experts, only Dr. Ramsey consistently gave direct and straightforward responses to questions put to him by the Board, conceding points he believed valid, despite the consequences to his cause. In contrast, Drs.Gray and Bergmann often appeared openly partisan and argumentative in their responses to the Board's questions. The Board's experts were reasonable and forthright. On the whole, the court finds the Board's statistical experts to be more qualified, more credible, and less biased in favor of their party's position than plaintiffs' experts.

EVALUATION OF STATISTICAL EVIDENCE IN SUPPORT OF CLASS CLAIM

Plaintiffs claim that their statistical evidence proves that women faculty members are intentionally treated less favorably by the Board because of their sex than men faculty members with respect to salary, promotion and rank, tenure, and advancement to administrative positions. Because the statistical evidence is crucial, the court will begin its analysis of that evidence with a general discussion of the function, nature, and limitations of statistical evidence in Title VII actions.

Plaintiffs' cause of action is a disparate treatment cause of action. In order to prevail, plaintiffs must prove not only that they were treated differently from men, but that the Board had a discriminatory motive, intent, or

animus in treating them differently. See Texas Department of Community Affairs v. Burdine, 450 U.S. at 253; International Brotherhood of Teamsters v. United States, 431 U.S. at 335 n. 15. Discriminatory motive, intent, or animus may be inferred from differences in treatment, however. The function of statistical evidence is to provide circumstantial evidence from which the court may draw an inference of discriminatory motive, intent, or animus. Spaulding v. University of Washington, 740 F.2d 686, 703-04 (9th Cir. 1984). This court must (1) examine the reliability and validity of the statistical evidence and (2) determine the extent to which that statistical evidence is probative or relevant, given the other factual evidence in the case. As the Ninth Circuit recently warned:

Granting that statistics "when properly authenticated, constitute an accepted form of circumstantial evidence of discrimination," EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 645 (4th Cir. 1983), we are still sobered by warnings that statistical evidence has an "inherently slippery nature," Wilkins v. University of Houston, 654 F.2d 388, 395 (5th Cir. 1981), vacated and remanded, 459 U.S. 809, 103 S.Ct. 34, 74 L.Ed.2d 47 (1982), aff'd on remand, 695 F.2d 134 (5th Cir. 1983), and "can be exaggerated, oversimplified, or distorted to create support for a position that is not otherwise supported by the evidence." Note, Judicial Refinement of Statistical Evidence in Title VII Cases, 13 Conn.L.Rev. 515, 525 (1981). Thus, the weight of statistical proof relies implicitly on "the existence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination." White v. City of San Diego, 605 F.2d at 460, quoting United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. [1971]), cert. denied, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).

Id. at 703.

Statistical evidence necessarily ignores the peculiar, particular facts of individual cases. Statistical evidence is simply the overall effect of individual cases viewed in the aggregate. Because statistical evidence may both illuminate and distort reality, a court relying on such evidence must constantly look from the statistics to the factual realities in order to gauge the probative value of the statistics.

Distortion rather than illumination may occur in two instances. First, distortion may occur in the mechanical operation of the statistical model used. Such distortion may be of a highly technical nature, particularly when sophisticated techniques, such as multiple regression, are used. Second, distortion may occur if the multiple

regression model assumes, or those relying on the model assume, facts which are not supported by the evidence. The most probative statistical evidence will use models contoured to fit factual realities. To the extent that statistical models include erroneous factual assumptions, their probative value is lessened.

The simplest of the statistical analyses done in this case are straightforward comparisons of the average salary, average tenure status, and average rank of men and women in the Oregon State System of Higher Education. These studies show substantial differences in the average salary, the average tenure status, and the average rank of men and women. The court cannot tell, however, from this information alone, whether differences in treatment

between men and women are because of sex discrimination, because of differences in relevant job qualifications, or because of differences in the jobs actually performed.[1]

In order to prevail plaintiffs must prove that even after all relevant qualifications are taken into account, there still remains a difference in the salary, rank, and tenure status of women, from which the court may infer sex discrimination. There are two basic methods plaintiffs can use to prove this difference: (1) matching studies, and (2) regression analyses. In matching studies, male-female pairs in which both individuals match closely with respect to certain employment qualifications thought or known to influence salary, rank, and tenure status are studied to determine whether men and women are

treated equally on the average. A more sophisticated and complex statistical method is known as regression analysis. A regression analysis attempts algebraically to determine the average effect of a given employment qualification on the employment outcomes of an entire group. Hence, regression analyses are used to account for differences in average qualifications between men and women not by matching pairs of actual individuals who have the same qualifications, but rather by mathematical manipulation. Both methods have strong and weak points. Matching techniques are more easily understood, but they usually result in an analysis of only a portion of the targeted population because no matches exist for some individuals. Regression analysis allows for a study of an entire population, but

the method is very complex and may produce misleading results if appropriate variables are omitted from, or inappropriate variables are added to, the regression analysis.[2]

Determining the variables that should be used in a regression analysis first requires an examination of what is to be studied by the regression analysis. In the present case, the salary, rank, and tenure status of men on the average and of women on the average in the Oregon State System of Higher Education is to be studied. In order to decide whether sex is a factor in the salary, rank, and tenure status of men on the average and of women on the average, it is necessary to control for as many as possible of those factors that are known from other evidence to influence salary, rank, or tenure status. In other

words, a regression analysis model upon which a court may rely to infer sex discrimination must include as explanatory variables those things known to influence salary, rank, or tenure status. This is important because the effect of a relevant explanatory variable which is omitted from the model but is associated with some variable that is in the model, will show up in the coefficient of the variable that is in the model.[3] For example, plaintiffs' "raw average" difference between male and female salaries can be thought of as the sex coefficient of a regression model with sex as the sole independent, explanatory variable. This "sex coefficient" is higher in this model containing no other explanatory variables precisely because the omitted variables relate to sex -- e.g., women have fewer

Ph.D.s than men, fewer years of experience than men, and so on. Hence, any omitted variable associated with sex will impact the sex coefficient. The first issue, then, that the court must determine is the propriety of the explanatory variables used by the plaintiffs in their regression models. In their first report (Ex. 1) plaintiffs use the following factors as explanatory variables:

Age at hire[4]

Years of service[5]

Whether the individual had obtained a Ph.D.

Years since receipt of highest degree

Ethnic origin

Whether the individual's highest degree was obtained after hire

Discipline (in "Model 2")

In their rebuttal report (Ex. 2782), plaintiffs use:

Age at hire

Years of service

Level of highest degree obtained (B.A., M.A., or Ph.D.)

Years since receipt of highest degree[7]

Whether the individual's highest degree was obtained after hire

Discipline (in "Model 2")

Plaintiffs contend that the variables they have used are appropriate proxies or substitutes for education and experience, factors that do, in fact, enter into pay, promotion, and tenure decisions. The Board contends that (1) plaintiffs' variables are inaccurate and

inappropriate substitutes for actual relevant prior experience and education, which are the factors plaintiffs are trying to measure; (2) plaintiffs' variables are faulty because they do not take into account the quality of prior education and experience; and (3) certain of plaintiffs' variables overstate the actual qualifications of women as compared to men.

Biases in the Variables in Plaintiffs' Model

As to the variables (1)years since receipt of highest degree; (2)age at hire (years since birth at hire); and (3)years of service (years since first hire); the court finds that these variables do not measure actual relevant experience as they purport to do.[8] They measure only potential relevant experience. For example, plaintiffs'

regression models treat as equal two individuals who received Ph.D.'s in 1960 (years since receipt of highest degree) even though one individual may have been out of the work force for some or all of the period since 1960. Similarly, plaintiffs' regression models also treat as equal two individuals hired in the same year, even though one may have worked part time and the other full time.

The variable "age at hire" suffers from similar flaws. This criticism is particularly important here, as the evidence shows that women tend to work fewer hours per year than men, that women are apt to take more time away from their jobs than men, and that women are more likely to work part time than men. See Testimony of Dr. George Johnson, Tr. 23,740-41; Ex. 2157, Ahern & Scott,

Career Outcomes in a Matched Sample of Men and Women Ph.D.'s, Tables 1.9 and 1.10 at 10 (1981); Ex. 2, Table A1; Testimony of Dr. Fred Ramsey, Tr. 1930. By failing to account for this, plaintiffs' regression models tend to overstate the relevant qualifications of women as compared to men. That is, given a group of male faculty and a group of female faculty possessing the same average years since degree, age at hire, and years of service as defined in the regression models, the male group will in fact have more actual, relevant experience than the female group. Because the male group has more actual, relevant experience, it is to be expected that the average salary, rank, and tenure status of the male group will be higher than the female group. Yet the regression models will attribute the

higher salary, rank, and tenure status of the male group to sex discrimination because, according to plaintiffs' model, the two groups are equally qualified. Hence, plaintiffs' "years since" variables are inherently biased and will result in the appearance of sex discrimination even though none is actually present.

The "years of service" variable is also biased because it ignores the practice of hiring senior faculty from outside the system into the higher ranks. If two equally qualified individuals, one man and one woman, obtain Ph.D.'s in 1965, and the woman begins her career in the Oregon State system in 1965 and the man begins his career elsewhere and then comes to the Oregon State system in 1980, plaintiffs' model will show disparate treatment of

the woman even if both the man and the woman are at the same salary, with the same rank and the same tenure status. The reason is that the woman has more "years of service" under plaintiffs' model. Because senior faculty hired at the upper ranks are predominantly men,[9] the "years of service" variable is biased in a manner systematically related to sex. This will tend to generate a larger negative sex coefficient[10] in the regression analysis model even where no discrimination exists. To compute a figure for "actual years of relevant experience" for each individual in the Oregon State system would be a monumental task. Nonetheless, the court concludes that these variables are biased to some extent, that the bias is related to sex, and that the bias has led the regression analysis models to generate an appearance

of sex-based differences in treatment, even though such differences may not in fact exist.

The Effect of Variables Excluded from Plaintiffs' Models

The Board's next criticism of plaintiffs' regression analyses is that certain variables have been left out of the regression analysis models that should have been included.

One area of criticism relates to the treatment of full-time and part-time employees in plaintiffs' regression analysis models. The salary figures used by plaintiffs control for the fact that some faculty are on nine-month salaries and some are on twelve-month salaries by multiplying twelve-month salaries by 9/11 -- a standard procedure used by the Board itself. The salary figures are also adjusted for differences

in "full-time equivalent" (FTE) level. As noted earlier, the FTE of an academic position in the Oregon system represents the extent to which the position is full- or part-time. A position with an FTE of .75 is thus a "three-quarter-time" position. The salary figures used by plaintiffs control for FTE differences; for example, a faculty member earning $15,000 per year in a .75 FTE position would have in plaintiffs' model a salary level equal to a faculty member earning $20,000 in a 1.0 FTE position. However, there is no control in plaintiffs' models for the fact that part-time faculty members are generally paid less per FTE unit than are full-time faculty members doing the same work. That is, a faculty member working at .75 FTE in a position that would bring $20,000 per year if it were a 1.0 FTE

position will generally make less than the salary of $15,000 computed by multiplying the full-time salary times the FTE level. Because more women than men tend to be part-time,[11] the result of failing to control for this factor will be a negative effect on the sex coefficient in plaintiffs' models. This means that the models will indicate a sex-based difference in treatment adverse to women even if no discrimination is actually present.[12]

The Board's second criticism is that plaintiffs' studies are devoid of any variables relating to the quality of prior experience, prior education, or present productivity or academic merit. The Board argues that in an academic setting, inclusion of some measure of quality is necessary for any statistical

analysis to be probative. Plaintiffs' response to this criticism is essentially three-fold: (1)most quality factors are not subject to quantification and hence cannot be used in statistical models; (2)most evaluations of productivity or merit are made by the very decision-makers against whom plaintiffs allege discrimination, and therefore, even if quality and productivity factors could be quantified, they would be "tainted" variables; and (3)there is no showing that the quality of women's experience, education, or academic merit is on the average any lower than that of men.[13]

The anecdotal evidence is overwhelming that factors such as research quantity and quality, teaching and administrative skills, and service to the institution and to the community

are extremely important and often determinative factors in individual decisions involving pay, promotion, and tenure. In presenting individual cases, both plaintiffs and the Board rely on evidence of the quality of the individual's prior education, prior experience, and present academic merit. It is undisputed that at all of the institutions of higher education considerations of quality are factors entering into employment decisions. The court rejects the position announced by plaintiffs at pages 116-17 of their rebuttal report:

> [The Board] suggests that plaintiffs use education, experience and discipline in an attempt to approximate some true qualifications variables. This is not the case, however. Plaintiffs use the education, experience and discipline as predictor variables because we

> believe that persons having the same degrees, the same years of experience and the same discipline should receive comparable salaries, unless it can be shown objectively that the performances differ. Plaintiffs are not attempting to model the process in which the administrators in OSSHE determine the "qualifications" of an individual. That determination within the OSSHE is highly subjective and unequal in its impact on women.

Title VII does not prohibit colleges and universities from considering non-quantifiable, subjective differences in the quality of faculty members' backgrounds and work experiences -- both past and present -- in making employment decisions. The Ninth Circuit in Spaulding made clear that the use of subjective criteria in decision making is not ordinarily subject to a disparate impact attack. See Spaulding, 740 F.2d at 709. Spaulding indicates that in a

disparate treatment action, use of statistics that fail "to control for exactly those differences between individuals that can legitimately lead to their being treated differently" are suspect. Id. at 704.

This court finds that the use of subjective evaluations of the quality and quantity of faculty members' academic merit by decision-makers in the Oregon State System of Higher Education is permissible and necessary under Title VII. Ordinarily, the subjective nature of employment decision-making in most employment situations requires a higher level of judicial scrutiny. However, in academic and professional employment situations, courts should be reluctant to second-guess subjective decisions made by employers or to impose the court's evaluation of the quality or merit of

academic and professional employees on defendants. See, e.g., Zahorik v. Cornell University, 729 F.2d 85 (2nd Cir. 1984); Faro v. New York University, 502 F.2d 1229 (2nd Cir. 1974); Green v. Board of Regents, 474 F.2d 594 (5th Cir. 1973); see generally 2 A. Larsen & L. Larsen, Employment Discrimination [2C][2C]50.70 et seq. (1983); but see Powell v. Syracuse University, 580 F.2d 1150 (2nd Cir. 1978), cert. denied 439 U.S. 984 (1978).

In certain jobs, only quantifiable and objective minimum qualifications are required, and job performance can also be measured by quantifiable and objective means. In these situations, the employer's "subjective" opinions of an applicant will not be job-related -- for example, whether a supervisor likes an employee's appearance and demeanor. In

such situations subjective opinions may lead to sexual and racial discrimination. In contrast, the subjective evaluations of decision-makers in academia are closely job-related: the subjective evaluations of academic merit made by one's peers define one's standing in the academic community. This is not to say that racial or sexual discrimination cannot infiltrate the subjective decision-making processes in academia. But to prove a violation of Title VII, plaintiffs must do so within the context of the processes used by the Board to make employment decisions. Title VII does not require colleges and universities to adopt or to abandon any particular decision-making practices. Title VII only requires that the practices be applied without regard to sex.[14] Hence, in order to prevail,

plaintiffs must present statistical evidence that models the decision-making processes under study. The absence of any control for quality in plaintiffs' statistics is not of itself fatal, but is an obvious weakness in the studies.[15] Certain factors indicative of quality that are outside the control of the Board and hence not subject to "taint" could have been included in plaintiffs' regression analyses -- for example, quality of degree granting institution or prior rank. The main dispute between the parties regarding quality or academic merit relates to rank as a variable; this dispute and its resolution is discussed in the section on rank.

The Board also criticizes plaintiffs' method of controlling for the highest degree obtained. In plaintiffs' first report, plaintiffs

used as the highest degree obtained variable whether or not a faculty member had obtained a Ph.D. degree. This method is deficient in several respects. First, the model treats as equal all faculty without Ph.D. degrees. In plaintiffs' model a faculty member with a B.A. degree is considered to have as much education as one with an M.A. degree. Second, plaintiffs' model fails to account for the fact that in certain disciplines degrees other than the Ph.D. degree are considered terminal. A terminal degree is the degree treated by a discipline as the highest degree ordinarily obtained. For example, a Doctor of Jurisprudence (J.D.) degree may be considered a terminal degree in law; a Master of Fine Arts (M.F.A.) degree may be considered a terminal degree in art. Plaintiffs' first model treats as equal

a J.D. degree, an M.F.A. degree, and a B.A. degree. The evidence indicates that the receipt of a terminal degree is very important in determining salary, rank, and tenure status. Plaintiffs' model also does not take into account multiple degrees, although the anecdotal evidence indicates that at least in some instances this is an important factor in employment decisions. Thus, plaintiffs' first model does not completely and accurately control for the highest degree. In contrast, the Board's regression models use as a highest degree variable whether someone has obtained a degree considered terminal in his or her field.

In contrast to plaintiffs' first report, plaintiffs' rebuttal report refines the highest degree variable somewhat, by allowing for three levels

of highest degree, Ph.D., M.A., and B.A. However, plaintiffs' rebuttal report contains no measure of terminal degrees which are not Ph.D. degrees, such as the M.F.A. degree. Finally, plaintiffs' highest degree variable does not take into account the quality and reputation of the institution from which the degree was obtained, even though this variable is not under the control of the Board, and even though this variable is most certainly a factor in the initial salary of newly hired faculty.

Technical Criticisms of Plaintiffs' Regression Analyses

The Board also criticizes the technical and mechanical aspects of regression analysis models in general. The regression analysis procedure is an algebraic process that rests upon certain structural assumptions for its validity.

When these assumptions are not met, the results of the regression analyses may be invalid and misleading. See D. Baldus & J. Cole, Statistical Proof of Discrimination [2C]8A.2 at 76 (1980). Although technical in nature and difficult to grasp, an understanding of these structural assumptions and an appreciation of the possible misleading results if the assumptions are not met are critical elements in the evaluation of the probative value of regression analyses.

The first problem involves what is known as "interaction." Regression analysis is an averaging technique. The regression analysis model produces coefficients representing the average value or weight attached to an explanatory variable over the entire population under study. For example, if

a regression analysis model produces a coefficient of $250 for the "years of service" variable, this means that on the average for the population under study, each additional year of service results in a $250 raise in salary. It is possible, however, that the weight or value placed on an explanatory variable is systematically related to another variable in the model. For example, it might be that each additional year of service is valued more highly for individuals without terminal degrees than for individuals with terminal degrees. Or, more realistically, it may be that in different academic departments different explanatory variables are rewarded differently. For example, a terminal degree may be more important in a department that stresses research, while a year of service might be more

important in a department that stresses teaching.[16] If such situations occur, then one structural assumption of the regression analysis model -- the "additivity assumption"[17] -- is not met. In such situations, the variables are said to "interact"; that is, one explanatory variable (e.g., department) has an effect on the values of other explanatory variables. Depending on the distribution of men and women over the various explanatory variables, the effect of failing to account for this interaction may produce a negative sex coefficient even if there is no discrimination against women.[18]

There are two ways to account for the interaction possibility. One method is to do separate regression analyses for each value of the variable thought to affect the value of other variables.

For example, if discipline or department is thought to influence the value of other variables, then individual regression analyses could be run for each discipline or department. A second method is to include as variables in the model "interaction terms," which account for the interactive effect of some variables. See Baldus & Cole, supra, at 278.

In the present case, the primary focus is on the interactive effect of discipline or department. The Board contends that plaintiffs' regression analyses are flawed because they fail to take into account the fact that different departments value different qualifications in different ways. To counter this objection, plaintiffs did limited studies to see whether in fact discipline or department was interactive,

and, if so, if failing to account for the interaction made the sex coefficients in plaintiffs' regression analyses more negative.

Plaintiffs first did a department-by-department regression analysis for the University of Oregon (U of O) for the 1979-80 academic year. The results of this study, (Table 15 of Ex. 2782) confirmed that the department variable was substantially interactive; that is, the coefficients for the other explanatory variables varied widely in different departments. More significantly, there was a wide variety in the value of the sex coefficients in the various departments. But most importantly, the aggregate sex coefficient for the U of O was approximately 30 percent less than the sex coefficient for the institution in

plaintiffs' equivalent regression analysis models that did not account for interaction. This tends to confirm the validity of the Board's criticism: Failure to account for interaction by discipline or department makes sex coefficients more negative.

Plaintiffs next did a regression analysis using interaction terms as variables, which allowed for estimates of the effect of the other explanatory variables to vary by groupings of related departments. The results of this analysis (Table 16 of Ex. 2782) again confirm the Board's criticism: At every institution except Oregon Institute of Technology and Oregon Health Sciences University, allowing for the interactive effect of discipline made the sex coefficient less negative. The reduction was 43 percent at Oregon State

University, 22 percent at Western Oregon State College, and 14 percent at the University of Oregon.

The conclusion to be drawn from these studies is clear -- the sex coefficients in plaintiffs' regression studies that do not account for the interactive effect of discipline or department are substantially more negative than if interaction is taken into account. No studies were done to test the effect of the interaction of discipline or department on the rank and tenure regressions. However, given the magnitude of the changes in the sex coefficients in the salary regression analyses when depart mental interaction is accounted for, as well as the results of Dr. Siskin's promotion and tenure studies (which were done on a department-by-department basis), the

court concludes that the sex coefficients in the rank and tenure studies may also be more negative as a result of the failure to account for the interactive effect of department. The court cannot determine if other variables in plaintiffs' model besides discipline or department have an interactive effect. But the failure to account for interaction is a serious and substantial flaw in plaintiffs' regression analysis models.

A second assumption made by a regression analysis model is "that a one unit change in [an explanatory] variable will always produce the same effect on the [variable to be explained], such as salary, regardless of the point on the scale for the [explanatory] variable at which the change occurred." Baldus & Cole, supra, at 276. An example of this

"straight-line assumption" involves the variable "years of service". If, in fact, an employee's twentieth year of service results in the same increase in salary as the second year of service, then the straight-line assumption is met. If, however, raises and promotions come more frequently in earlier years of employment than in later years, then the assumption will not hold. Deviation from the assumption may reduce the predictive capacity of the regression analysis model and also affect the sex coefficient. Use of exponential or logarithmic terms (e.g., "years of service squared") may compensate for non-linearity. Id. at 277. In the present case, there is no evidence to indicate whether plaintiffs' variables meet this "straight-line" assumption. The assumption is mentioned because it is

another possible source of error in plaintiffs' regression analyses. Plaintiffs bear the burden of demonstrating "that the assumptions necessary for the model's use [have] been satisfied." Sobel v. Yeshiva University, 566 F. Supp. 1166, 1182 (S.D.N.Y. 1983). Failure to validate the model by showing that the variables in the models meet the straight-line assumption diminishes the probative value of plaintiffs' regression analysis models.

Another structural problem with regression analysis is the phenomenon known as "attenuation." Attenuation occurs when a predictor variable in the regression equation is measured with some inherent error. Ex. 2782 at 115. For example, if the predictor variable to be measured is "actual relevant

experience," use of the "years since" variables as proxies introduces measurement error vis-a-vis the ideal predictor variable. Additionally, there may also be error in the measurement of the values of the proxy variables themselves. The result of this inherent error is that the value of the ideal predictor variable is often wrongly stated, sometimes too high and sometimes too low.

This inherent error produces a "flattening" effect on the regression line; that is, the slope of the line is lessened and the model does not measure as strong a relationship between the explanatory variable and the variable to be predicted as actually exists. Testimony of Dr. Paul Meier, Tr. at 23,533-34. When the groups under study are not equally distributed with respect

to the explanatory variable, the regression analysis will produce the appearance of differences in treatment between the groups after controlling for the explanatory variable, even when none in fact exists. In the present case, for example, because women have on the average lower levels of experience than men, the attenuation phenomenon will produce negative sex coefficients even if no discrimination is actually present.[19] This result is a "statistical artifact" caused by the mechanics of the regression technique itself. Id. at 23,535. It is important to note that the attenuation phenomenon is wholly distinct from the problem of the selection of variables that may themselves be systematically biased. Attenuation may occur even though the errors in the measurement of the

explanatory variables are not systematically biased. Hence, the use of proxy variables may lead to the appearance of sex discrimination even where none exists, both (1)because the proxies themselves are biased (which is true in this case) and (2)because of attenuation, even if the proxies themselves are unbiased.

Plaintiffs attempt to address the issue of attenuation in their rebuttal report; however, the discussion is very brief and is not accompanied by the actual results of the studies plaintiffs ran to check for attenuation. The Board's expert Dr. Meier testified that "the description of the outcome [of these studies] was so brief I couldn't make out what it really did tell us." Tr. 23,535. The two approaches used by plaintiffs were described as "a type of sensitivity

analysis" and "reverse regression." Plaintiffs' rebuttal report at 115-16. The result of the sensitivity analysis suggests "that even with errors in the qualification variables large enough to account for a 10 per cent difference in salary, the sex coefficients would remain negative and statistically significant." Id. Of course, this does not indicate the extent to which the magnitude of the negative sex coefficients are increased by the attenuation phenomenon. The reverse regression[20] results were "variable, with some significant differences at a few institutions. . . ." Id. at 116.

From this evidence, the court concludes that attenuation is another problem with plaintiffs' regression analyses, and may result in the generation of negative sex coefficients

even though no discrimination is actually present.

Data Base Quality

Another issue involving the statistical evidence of both parties is that of data base quality. All other factors being equal, statistical evidence based on correct data will have more probative value than statistical evidence based on inaccurate data. Hence, it is important to examine the correctness of the data base.

The data used in plaintiffs' and the Board's regression analyses are those contained in the Board's personnel data base. This data base contains a variety of information on all faculty members employed by the eight institutions. Since 1968, the data base has been computerized. Although there is a centralized data processing facility for

the entire Oregon State System of Higher Education, its function is primarily technical. Changes and additions to the data base are made at the institutions themselves. Testimony of David Smith, Tr. 23,459-66. There are relatively few systematic checks to insure that the data in the system are accurate. Because the institutions themselves do not rely on the information in the data base in making personnel decisions regarding salary, promotion, and tenure,[21] there is no impetus for either employer or employee to be concerned with errors in the data base except for salary. Because paychecks are generated from salary data on the tape, errors in salary data are ordinarily brought to the attention of the employer by the employees.

Thus, there is a possibility of errors in the data base with respect to the

explanatory variables used by the parties. Plaintiffs claim that they are entitled to rely on the Board's data base for their statistical studies, and are entitled to a presumption that the data are accurate, notwithstanding evidence to the contrary. However, this is not the law. All relevant information about faculty within the Oregon state system was available to plaintiffs through the discovery process. For example, plaintiffs had access to the vitae of faculty members and could have used these to check the accuracy of the information on the tapes. To be sure, this would have been a time-consuming task, but it would have been an equally difficult task for either party.[22] This is not a situation where an employer has more ready access to employment information than employees.

Although "plaintiffs cannot legitimately be faulted for gaps in their statistical analysis when the information necessary to close those gaps was possessed only by defendant and was not furnished . . . to plaintiffs," Trout v. Lehman, 702 F.2d 1094 at 1102 (D.C. Cir. 1983), vacated on other grounds, ___ U.S. ___, 79 L.Ed.2d 1404 (1984), quoting Trout v. Hilgado, 517 F. Supp. 873 at 883 (D.D.C. 1981), such a situation is not present here.[23] The deficiencies in data quality in this case may detract from the value of statistical evidence. Spaulding, 740 F.2d at 704; Trout v. Lehman, 702 F.2d at 1101. Therefore, to the extent that plaintiffs' statistical analyses are based on erroneous data, they are less probative.

Ample evidence demonstrates that the

Board's personnel data base tapes are inaccurate. Plaintiffs' own witnesses testified to the inaccuracy of the data on the tapes. See, e.g., testimony of Dr. Anna Penk, Tr. 1075, 1291-92.[0C]24[0D] Plaintiffs also presented evidence of the inaccuracy of the tapes in their rebuttal report. Plaintiffs subjected their original data base to a computer program that checked for "anomalies" in the data. The anomalies program identified certain data thought to be erroneous, essentially by locating bizarre data. For example, it flagged as possibly erroneous salaries listed as less than $1000 or more than $95,000. All other salaries were assumed to be accurate. Hence, the anomalies program only picked up a few obvious errors. Plaintiffs then checked the data located by the program against certain

information used by the Board, such as Dr. Siskin's promotion and tenure sheets and institutional correction sheets (discussed below) and school catalogues. Plaintiffs also personally contacted individuals at the institutions. The exact number of corrections made is not known, although Dr. Ramsey testified that a "reasonable guess" was that 500 individuals had data changes as a result of the anomalies search. Tr. 21,276. Plaintiffs then ran a regression analysis for salary at Oregon State University using both the uncorrected and the corrected data base. Table 9 of Ex. 2782 shows that the limited corrections to the data base resulted (1) in an 11.4 per cent decrease in the magnitude of the negative sex coefficient, and (2) a 2.3 percent increase in the magnitude of the adjusted R^2 of the model.[25] Hence, use

of more accurate data results in a more predictive regression analysis model with decreases in the magnitude of the negative sex coefficients.

On the other hand, the Board undertook a more extensive data-cleaning program. Dr. Siskin checked the data for missing, inconsistent, or dubious information and requested verification from the institutions regarding such data. He also had the institutions gather information for his promotion and tenure studies. Then he cross-checked this information against the information on the tapes and asked the institutions to verify any inconsistencies.

The Board also chose to use tapes archived at a different time of the year than the tapes used by plaintiffs. Plaintiffs used tapes generated in November; the Board used tapes generated

in July. The Board used the July tapes because: (1) some updating of information occurs between November and July during the academic year, and is reflected on the July tapes but not on the November tapes; (2) the July tapes more accurately reflect the FTE of faculty for the entire year; for example, by using the November tapes plaintiffs will have recorded a faculty member who worked at 1.0 FTE for the fall term and then left the institution as having an FTE of 1.0 throughout the entire academic year, while by using the July tapes the Board will have recorded the individual's actual FTE level over the whole academic year;[27] and (3) raises are sometimes delayed past the early part of the academic year, and hence may not appear on the November tapes, but will appear on the July tapes. See Testimony of Dr.

Siskin; Tr. 22,812-15. Thus it appears that the data used by the Board in its regression analyses are more accurate than those used by plaintiffs.

To conclude, the court finds that (1)the July tapes are more complete, accurate, and appropriate for use in the regression analyses than the November tapes; (2)the Board's personnel data base tapes contain errors, particularly with respect to highest degree and year of highest degree; (3)the Board's data-cleaning process, along with its use of the July tapes, results in a more accurate data base than that used by plaintiffs; (4)no substantial evidence exists to indicate that the information collected by the Board in its attempt to clean the data is systematically biased in such a way as to produce results more favorable to the Board; and (5) to the

extent that Dr. Siskin's promotion and tenure data are erroneous as to Western Oregon State College (a conclusion the court is unable to draw), the errors are not systematically biased in favor of the Board.

The Probative Value of Plaintiffs' Statistics

Of what ultimate effect are the methodological deficiencies in plaintiffs' regression analyses? Plaintiffs take the position that the Board's criticisms should be of no effect unless the Board presents its own regression analyses in which the deficiencies are corrected. Plaintiffs contend that "unquantified, speculative, and theoretical objections to the [plaintiffs'] statistics are properly given little weight by the trial court. ..." Trout v. Lehman, 702 F.2d at 1102.

However, this court finds that the Board's criticisms of plaintiffs' methodology are substantial and significantly lessen the probative value of plaintiffs' regression analyses.

The use of complex statistical techniques as evidence in employment discrimination cases has developed rapidly in the last ten years. Yet the proliferation of the use of such complicated statistical analyses has proceeded with very little guidance from appellate courts as to how rigorously complex statistics should be analyzed and what methods should be used for such an analysis. From this court's review of the cases, courts seem to fall into two groups. The first "seem[s] to find the sirenlike attraction of mathematical precision too powerful to resist." P.Meier, J.Sacks & S.Zabell, What

Happened in Hazelwood: Statistics, Employment Discrimination, and the 80% Rule, American Bar Foundation Research Journal, Winter 1984, 139, 162 (1984). Such courts place great credence in the results of complex statistical analyses, seemingly accepting the statistics as determinative, with little or no discussion or consideration of the flaws in the statistical techniques themselves. See, e.g., Melani v. Board of Higher Education of the City of New York, 561 F. Supp. 769 (S.D.N.Y. 1983); Trout v. Hilgado, 517 F. Supp. 873 (D.D.C. 1981), aff'd sub nom Trout v. Lehman, supra; Segar v. Civiletti, 508 F. Supp. 690 (D.D.C. 1981), aff'd sub nom Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984). Other courts tend to be more sensitive to the "inherently slippery nature" of statistical evidence, Spaulding, 740

F.2d at 703, and require a greater showing that the statistical models used by parties are valid before accepting the results of such models as probative. See, e.g., Sobel v. Yeshiva University, 566 F. Supp. 1166 (S.D.N.Y. 1983); Coser v. Moore, 587 F. Supp. 572 (E.D.N.Y. 1983), aff'd 739 F.2d 746 (2d. Cir. 1984).

From both a legal and a logical standpoint, this court finds that the latter group's position is the more appropriate. The Spaulding opinion indicates that trial courts should under take a rigorous analysis of complex statistical evidence. An examination of the finer points, as well as the larger ones, in plaintiffs' regression analysis models is essential. "This is especially true when we are asked not only to take [statistics] for what they

mean, but also to draw an inference from them as to motive." Spaulding, 740 F.2d at 704. A rigorous examination of the individual "working parts" of plaintiffs' models is crucial to a determination of the probative value of the results of those models. The burden of proof always rests with the party offering and relying upon complex statistical methods to establish the validity of those methods in light of the facts of the specific case to which they are applied. To the extent that the Board has convinced the court that significant flaws exist in plaintiffs' regression analysis models, the probative value of the results generated by those models is decreased.

The Board has convinced the court that plaintiffs' regression analysis models are flawed. Further, the Board's

objections are not merely "unquantified, speculative, [or] theoretical." Trout, 702 F.2d at 1102. These flaws in the plain tiffs' models result in larger negative sex coefficients. Hence, the models give the appearance of discriminatory treatment of women even though none may exist. In particular, the Board has demonstrated that

> --plaintiffs' "years since" variables overstate the actual relevant qualifications of women;
>
> --plaintiffs' failure to account for differences between full-time and part-time faculty biases the regression in favor of women;
>
> --plaintiffs' failure to account for non-Ph.D. terminal degrees influences the regression results, as does the failure to take into account the quality of a faculty member's degree-granting institution;
>
> --plaintiffs' failure to control for the interactive effect of the department

variable biases the plaintiffs' models in favor of women, and failure to account for other interactive effects may also affect the model;

--the phenomenon of attenuation has an effect on plaintiffs' regression results favorable to plaintiffs;

--plaintiffs have failed to show that the "straight-line" assumption is valid in this case;

--the data used by plaintiffs in their regressions are inaccurate to some degree, and inaccurate data tends to result in larger negative sex coefficients.

The court rejects plaintiffs' notion that these flaws must be ignored unless the Board comes forward with a regression model in which the flaws are corrected. First, in several instances plaintiffs' own evidence indicates that the flaws do in fact produce larger negative sex coefficients. Second, the Board's non-regression statistical evidence tends to

show an absence of a pattern or practice of discrimination, from which the court may infer that the results of plaintiffs' regressions may be due to methodological flaws. Third, insofar as the anecdotal evidence does not support a finding of a pattern or practice of discrimination, the same inference may be drawn. Finally, as the party offering regression models as proof and as the party with the ultimate burden of persuasion, plaintiffs bear the burden of "validating" their regression models; that is, of demonstrating "that the assumptions necessary for the model's use [have] been satisfied." Sobel, 566 F. Supp. at 1182.

To conclude, the court is convinced that the plaintiffs' regression models suffer from methodological flaws such that even if a wholly nondiscriminatory

environment exists within the Oregon State System of Higher Education, plaintiffs' regressions would show negative sex coefficients, indicating an adverse treatment of women. This has two implications. First, plaintiffs repeatedly argue that even in those instances when their regression analysis results are not statistically significant, the fact that there is an overwhelming pattern of negative sex coefficients in the results is indicative of a pattern or practice of adverse treatment of women. However, if in fact plaintiffs' models will produce negative sex coefficients in a discrimination-free environment, then a pattern of negative sex coefficients is to be expected in the regression results. Second, the flaws in plaintiffs' models also inflate the magnitude of the

negative sex coefficients. Because the statistical significance of a result turns in part on the magnitude of the coefficient (the t-value being computed by dividing the coefficient by its standard error), it is impossible to tell whether the statistically significant results which were produced by plaintiffs' models would be negative and still statistically significant if the models were not flawed.

The Board may argue at this point that plaintiffs' pattern or practice class claim must fail. However, the flaws do not render plaintiffs' statistics wholly meaningless. Hence, the court will examine the statistical and anecdotal evidence relating to the claims of discrimination in rank and promotion, salary, tenure, and advancement to administrative positions,

keeping in mind the known flaws in plaintiffs' models in the process of drawing conclusions. It is to this task the court now turns.

CLASS CLAIMS FOOTNOTES

1. It is unclear after Spaulding whether plaintiffs must show that on the average men and women faculty, members per form substantially equal work or merely comparable work. On the one hand, the court stated that "we must evaluate the extent to which . . . statistics show comparability [of jobs] and then to what extent the comparability showing, along with other evidence of discriminatory animus, supports an inference of illegally discriminatory motive." 740 F.2d at 704. On the other hand, the court also noted that "[i]ntuitively, evidence of a pay disparity between jobs that are only comparable says very little about discrimination." Id.

2. Plaintiffs' expert statisticians' report (Pl. Ex. 1) explains multiple linear regression as follows:

> A more refined analysis, taking into account other variables which might predict salary, was conducted by means of multiple linear regression. This gives an average dif ference in salaries between men and women controlling for differences in various productivity variables. The basic methodology is to estimate the relation between salary and predictor variables such as degrees, teaching experience and other relevant factors. We give a brief explanation of the procedure:
>
> First, consider how salaries change.

If one has a salary of say, $10,000 and is given a promotion (or merit increase, etc.), the change in salary is stated as a raise, "r" say. If the raise is r=5%, the new salary is then computed as

S = (1 plus r/100) S = (1.05) ($10,000) = $10,500 Thus, one's salary at any given time may be viewed as a starting salary at time of hire multiplied by a string of constants, each representing a raise given for some achieve ment. On a logarithmic scale, the constants appear as additions to the logarithm of the base salary. And because regression techniques develop explanatory models that incorporate factors additively, we have taken the logarithm of salary as the response variable.

The methodology consists of estimating a relationship between the response and the predictor variables such as highest degree, years of experience, etc. The estimating equation looks like this:

log salary = b_o + b_1 (degree) + b_2 (years of service) + b_3 (age at hire) + ...

The constants b_o, b_1, b_2, etc. reflect raises in the following way. If a raise of r_1 is given for obtaining a Ph.D., then

b_1 = log (1 plus r_1/100).

Similar equations relate b_2 to the average raise given per year of service, b_3 to the average premium per year paid for additional (pre-hire) years of experience, and so on. The constant b_o is the logarithm of the initial salary at time of hire, averaged for all persons at an institution.

3. If the omitted variable is not related to any of the variables in the model, the omission will decrease the predictive capacity of the model.

4. Defined as present age minus the years since the individual was first hired into the Oregon State System of Higher Education. Significantly, neither the Oregon State Board of Higher Education personnel data base nor the parties themselves made adjustment in the "service year" (year of first hire) for those faculty who did not work for some period of time after "first hire".

5. Defined as present year minus year of first hire into the Oregon State System of Higher Education. See footnote 3, supra.

6. The discipline variable simply accounted for dif ferences in the average salary of different department groups. Adding a discipline variable such as this is not the same as running a regression by discipline or including interaction terms to account for the differing values placed upon the explanatory variables by different disciplines.

7. Only the highest degree obtained is coded non-zero, however; for example, a person with a Ph.D. degree obtained two years ago who had obtained a masters degree ten years ago would be coded the same as a person who obtained a Ph.D. degree two years ago and a masters degree three years ago. See Ex. 2782 at 23.

8. This is not a situation where the actual qualification plaintiffs seek to control for is subjective or non-quantifiable. The qualification sought to be measured by the "years since" proxy variables -- actual relevant experience-- is predominantly objective in nature and hence theoretically measurable in numbers.

9. Evidence presented showed that this is to be expected given the higher percentages of men with doctorates in this group. See Pl. Ex. 2757; Ahern and Scott; Career Outcomes in a Matched Sample of Men and Women Ph.D.'s; National Academy Press, 1981; Table 1.1, Number of science, engineering, and huma nities doctorates awarded to men and women annually, 1940 to 1978; p.2.

10. A negative sex coefficient on a regression result indicates that women are treated less well than men with respect to the employment outcome at issue. The larger the magnitude of the sex coefficient, the greater the disparity between men and women.

11. See testimony of Dr. Fred Ramsey, Tr. 1930, 1935. Plaintiffs' own studies show that there is a positive correlation between FTE and salary and that a greater percentage of women in the Oregon State System of Higher Education tend to be on part- time than do men.

12. Failure to control for present and past FTE level will also have an effect on plaintiffs' rank and tenure regressions. All other factors being equal, it is to be expected that faculty

members who have worked part-time throughout their careers in the Oregon State System of Higher Education will be at lower rank and tenure levels than those faculty who have worked full-time. Because more women than men are in part-time posi tions, failure to account for FTE level in the regression model results in the generation of negative sex coefficients of larger magnitudes than would exist if FTE were included as a variable.

13. Indeed, plaintiffs argue that the fact that women and men were given equal raises for the period 1978-83 is evi dence of generally equal productivity.

14. Nor does the court agree with the statement made during closing argument that Title VII requires all employees to be treated fairly. All Title VII requires is that if employees are treated unfairly, it is not because of their sex. In large bureaucratic institutions, individuals may be treated unfairly from time to time. Yet a Title VII violation is not made out simply by showing that a female faculty member was treated unfairly; Title VII requires that the unfair treatment be due to sex discrimination.

15. Plaintiffs attempted to control for some quality variables in their vita-matching study. However, as discussed later, this study has such serious methodological deficiencies that its probative value is nil.

16. Use of words such as "reward" and

"value" in describing the different coefficients attached to explanatory variables in different departments is metaphorical shorthand. The difference in the value of coefficients between departments may have nothing to do with the department "rewarding" on the basis of the variable at issue. For example, if one department frequently hires senior faculty at the upper ranks while a second only hires Ph.D.'s fresh out of school, the coefficient for "years of service" will be larger in the first department due to the greater number of senior faculty with high pay and low years of service. It thus appears that the first department is "rewarding" years of service more than the second department, when in fact no such process is occurring.

17. The additivity assumption is that the contribution of two explanatory variables in explaining a result can be most reliably computed simply by adding the separate average contribu tion of each. See Baldus & Cole at 278. If the magnitude of one variable changes in a way related to another variable, this assumption is not met.

18. The following is an example.

	DEPARTMENT 1	
	Ph.D.	non-Ph.D.
Men	$30,000 (8)	$10,000 (2)
Women	$30,000 (2)	$10,000 (1)

	DEPARTMENT 2	
	Ph.D.	non-Ph.D
Men	$20,000 (2)	$15,000 (1)

Women $20,000 (8) $15,000 (2)

Assuming the only two variables determining salary are department and holding a Ph.D. degree, and further assuming that the assign ment of women into department 2 was non-discriminatory, a simple examination of the tables reveals that there is no discrimination occurring because of sex. Note, however, that there are more men in department 1, which places a higher value on having a Ph.D. degree, and there are more women in department 2, which places less value on having a Ph.D. degree. A regression analysis, however, attempts to explain outcomes based on the average value of having a Ph.D. degree. In the example, the average reward over the entire group for receipt of the Ph.D. degree is $12,500. The average salary of department 1 is $20,000; the average salary of department 2 is $17,500. We may now predict the salary of each individual, using the average value of having a Ph.D. degree and adjusting for the average salary difference of the departments (essentially the procedure employed by plaintiffs in their regression). For example, the salary of a person with a Ph.D. degree in department 1 would be predicted by our simple model to be $20,000 (the average salary in the department) plus $6,250 (half of the average value of having the Ph.D. degree over not having the Ph.D. degree); the salary of a person without a Ph.D. degree in department2 would be predicted as $17,500 (the average salary in the department) minus $6,250 (half of

the average value of the Ph.D. degree). If we then separately compute the average salaries predicted by our model for men and women, and compare them to the actual average salaries of men and women in our example, the following results occur:

	Men	Women
Average Salary		
PREDICTED	$22,788.46	$21,442.31
ACTUAL	$24,230.77	$20,000.00

It appears that discrimination exists, because men are actually paid more than the model predicts and women are paid less than the model predicts. Yet no discrimination is present in the example. The appearance of discrimination is caused by the fact that more women than men are in the department that places rela tively less value on the Ph.D. degree.

19. See M. Finkelstein, The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases, 80 Colum. L. Rev. 736, 747 (1980), for a hypothetical example of how the attenuation phenomenon can cause a regression analysis to produce the appearance of strikingly large differences in the treatment of men and women when in fact they are treated identically.

20. In a reverse regression, qualification variables are regressed on salary, rather than vice versa. In other words, the reverse regression model attempts to predict qualifications by looking at salary. Dr. Meier testified

that he did not consider reverse regression a good technique. Tr. 23,535.

21. Such decisions occur at levels where the rank, degree, years of service, and other qualifications of individuals under consideration are either known first-hand by the decision makers or are available from other information, such as vitae, kept at a departmental or institutional level.

22. Although plaintiffs requested information regarding faculty members through interrogatories, the Board's response -- that the information was available in a not-necessarily accurate form on the computer tapes or in individual files that plaintiffs could look through if they wanted -- comported with Fed. R. Civ.P.33(c). This rule gives a party served with interroga tories the option to produce business records from which the information requested by the interrogatories can be obtained, if it appears that the cost to either party of culling the infor mation from the business records is substantially the same. As this was so in the present case, the court finds that the Board's response was appropriate.

23. This position -- that the Board had the obligation to locate for plaintiffs all relevant documents from which plain tiffs could derive relevant information regarding the qualifica tions of faculty members but had no obligation to update or correct its computerized data base beyond what it would do in the ordinary course of business -- was

reflected in this court's Order of June8, 1983. The Board was ordered to supply plaintiffs with the tape of the corrected June,1983 data base precisely because the Board had made the corrections in the ordinary course of business.

It should also be noted that plaintiffs did in fact receive information regarding the corrections the Board made to its data base. However, plaintiffs chose not to incorporate these changes into their data base.

24. Although Dr. Penk attempted to show that the errors in the data base were systematically biased in favor of the Board, Tr. at 1078-80, her study involves only one school and insufficient numbers from which the court could conclude that the institutions in the Oregon State System of Higher Education systematically neglect to upgrade the qualifications of women on the Board's tapes.

25. The adjusted R^2 measures the percentage in variation in the dependent variable (here salary) explained by the variables in the model. It is thus a measure of how well a regression model predicts employment outcomes.

26. Dr. Penk testified that the data used in Dr. Siskin's earlier promotion and tenure studies were inaccurate, at least at Western Oregon State College. Tr. at 1102-35. After Dr. Penk's testimony, the class was redefined and Dr. Siskin did another promotion and tenure study. Plaintiffs also claimed that the data in this study

were inaccurate. See Ex. 2782 at 45-50. However, Dr. Penk, who did the actual data examination, did not testify with respect to this portion of Ex. 2782, and hence the Board did not have the opportunity of cross-examining this portion of the exhibit. Dr. Penk's study was also done prior to the class redefinition, and hence it is possible that some of the differences between her data and Dr. Siskin's data result from the change in the class. Thus it is difficult to determine whether Dr. Penk's or Dr. Siskin's data are more accurate. Interestingly enough, plaintiffs themselves used Dr. Siskin's promotion and tenure study data when checking data flagged by their anomalies program. Ex. 2782 at 54.

27. For example, although the class as certified is restricted to faculty members of .5 FTE and above, the evidence indicates that a number of individuals were included in plaintiffs' computer matching study who were in fact at less than .5 FTE for the entire academic year under study, because the November tapes less accurately reflect FTE for the entire academic year.

INTERPRETATION OF REGRESSION ANALYSIS RESULTS

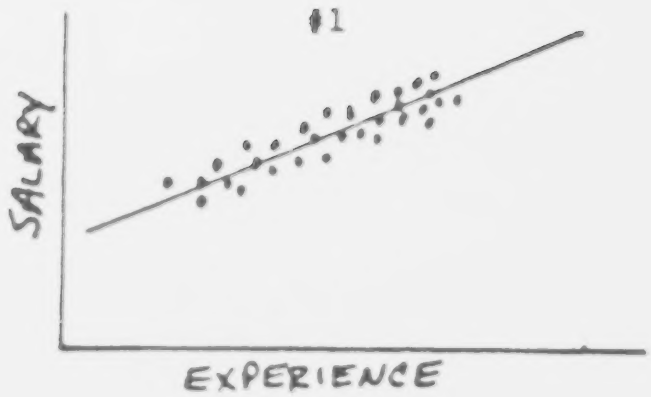
Before analyzing the results of specific regression analyses, it is important to understand the significance of the numbers produced by the regression analyses.

Regression analyses attempt to ascertain the average effect of a certain quality on an employment (or other) outcome. The average effect of the quality is represented by the coefficient for the variable representing the quality. In a salary regression analysis, for example, coefficients measure the effect on salary outcomes of a per unit change in the explanatory variables. Coefficients can be expressed in a number of different ways.[1] The coefficient for the residual explanatory variable of sex

is a measure of the average difference in salary between men and women after all other variables in the model are taken into account.[2] Because of the way the sex variable has been coded (+1 for women and 0 for men), a negative sex coefficient indicates a difference adverse to women, while a positive sex coefficient indicates a difference favorable to women.

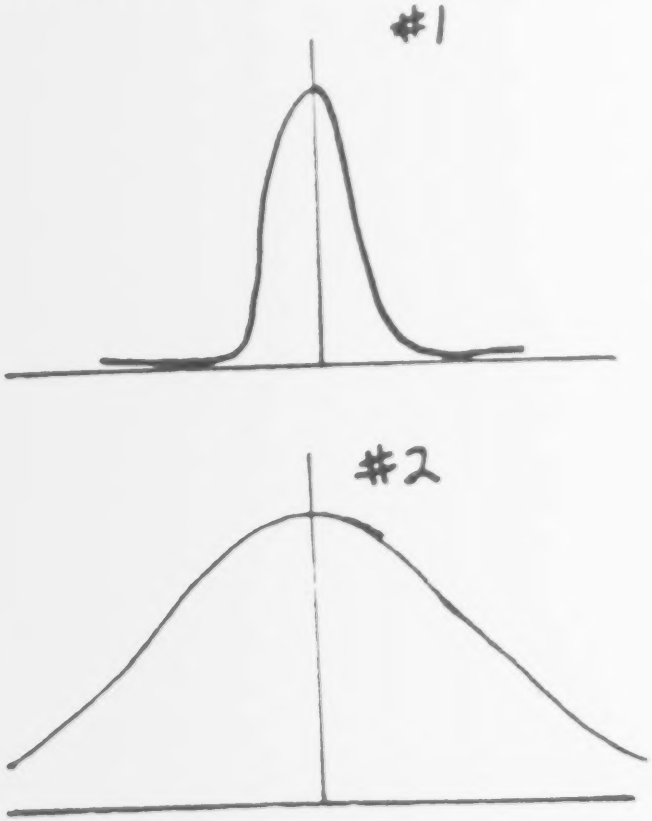
A second important series of numbers generated by a regression analysis are the t-value or number of standard deviations, the p-value, and the standard error. These numbers all attempt to measure the extent to which the average value of a variable as represented by its coefficient may be affected by chance. Any relationship between a variable and an outcome may be affected to a greater degree or a lesser degree by

chance.



For example, although the value for the coefficient of the "experience" variable will be the same in both

situations above (because the slopes of the two lines are the same), it is obvious from the diagrams that a much closer relationship between experience and pay exists in figure #1 than in figure #2. If one looks at and plots the spread of the actual observations around the regression lines, something like this will result:[3]



The standard error associated with a regression analysis coefficient is a measure of the variability that may exist in the actual, observed data; in other words, the standard error indicates how far apart the actual, observed values of the coefficient are likely to be from the average coefficient measured by the regression equation. The standard error value will also be influenced by the number of observations under study. The greater the number of observations, the smaller the standard error value produced by the regression analysis, all other things being equal.

A coefficient's standard error is the value associated with one standard deviation. In a normal distribution, about 68% of the total actual observed values will be within one standard deviation of the average value, and about

95% or 96% of the total actual observed values will be within two standard deviations of the average value. Thus, a coefficient of .10 with a standard error of .05 means that 68% of the actual observed values fall within .05 (one standard deviation below the estimated value) and .15 (one standard deviation above the estimated value), and similarly that about 95% of the actual observed values will fall between .00 and .20. See Baldus & Cole at 294-96.

A coefficient's standard error is the value associated with one standard deviation. Dividing the value of a coefficient by its standard error produces the t-value associated with the coefficient. In the example above, the t-value will be .10/.05 or 2.0. The t-value represents the number of standard deviations that the coefficient

generated by the regression model is away from a value of zero. Because a value of zero for a coefficient means that the variable being studied has no effect on employment outcomes, the t-value is a measure of the extent to which the coefficient is statistically significant -- that is, the t-value is a measure of how much the coefficient produced by the regression analysis varies from zero due to factors other than pure chance.

T-values may be converted to p-values or probability values. In a normal distribution, 95% to 96% of all actual values will fall within a plus-or-minus two standard deviation range from the average coefficient value. Thus a t-value of 2 is associated with a p-value of about .05, meaning that there is a 5% probability that any actual observed value of a coefficient will

fall more than two standard deviations above or below the estimated value of the coefficient due purely to chance. In the example above, odds are one in twenty that the actual value of the coefficient estimated by the regression model to be .10 will in fact be greater than .20 or less than .00.

A final important number generated by the regression analysis is the $\underline{R}^2$ or $\underline{\text{adjusted } R}^2$. These numbers represent the percentage of total variance in a dependent variable (e.g., salary) that is explained by or associated with the explanatory variables in the regression model. See Baldus & Cole at 259. The R^2 is thus a measure of how well the regression analysis works in predicting employment outcomes by using the variables in the model. By adding variables to the model sequentially, the

R^2 may also show how much individual factors contribute to salary outcomes.

It is stressed that the terms under discussion (except for the R^2 value) are all concerned with the extent to which regression analysis results may be due to pure chance or random variation. The values for these terms say nothing about the validity or propriety of the model itself. As an example, plaintiffs report that the average difference between male-female salaries at the University of Oregon in 1979-80 is 20.7%. (Ex.2782 at 98.) The t-value for this coefficient is 9.51 standard deviations, which is highly statistically significant. However, the high degree of statistical significance indicates only that the difference in the average salaries of men and women do not likely result from chance. The high

degree of statistical significance says nothing about the validity of the assumptions behind the regression analysis model that produced the figures. Here the model took no job qualifications whatsoever into account; hence the court is very reluctant to infer any discrimination from the result even though the magnitude of the difference is large and the statistical significance of the coefficient is high. A finding of statistical significance is necessary in order to infer discrimination from a regression analysis result. However, a statistically significant result is not necessarily probative of discrimination just because it is statistically significant.[4]

A distinction must be made, then, between the concept of statistical significance and the concept of practical

significance. A statistically significant regression analysis result simply means that the difference being measured does not likely occur because of chance. Whether a statistically significant result is practically significant must be determined with reference to the hypothesis the regression model is attempting to prove and to the validity of the model itself. In the present case, plaintiffs allege that the Board engages in a pattern or practice of discrimination against women faculty members because of their sex; to prevail, plaintiffs must show that this is the Board's standard operating procedure, a regular rather than an unusual occurrance. Given that this is the hypothesis plaintiffs' statistics attempt to prove, it may be that a statistically significant negative sex

coefficient of a very small magnitude will be deemed by the court to be of no practical significance. For example, if a salary regression analysis result produces a statistically significant sex coefficient of -.02, this means that male-female salary differences are not due to chance. But this sex coefficient alone does not say whether the overall average differences are produced by a pattern of sex discrimination, by flaws in the plaintiffs' model, by every female faculty member in the system being paid 2% less than precisely equally qualified males, or by most men and women being paid equally but in a few cases men being paid much higher salaries than equally qualified women. Because sex coefficients of small magnitudes may result from a small number of cases of discrimination, such

coefficients may be practically insignificant with reference to the pattern and practice issue in this case even though they are statistically significant.[5]

Aggregation

A very important issue relating to the statistical significance of the regression analysis results is the issue of aggregation. Plaintiffs brought this action as a system-wide class action against the Board, not as eight separate class actions against eight separate institutions. Hence, plaintiffs take the position that after the individual regression analyses at the individual institutions, it is appropriate to aggregate the results over the entire system. Because an increase in the number of observations results in a substantial increase in t-values, the

effect of aggregating the plaintiffs' results system-wide is to produce statistically significant coefficients in practically every situation. The Board argues that aggregation of results is improper, because each institution is autonomous with respect to salary, promotion, and tenure decisions. The Board contends that results can only be aggregated at the institutional level, and that aggregating over the entire system is simply a device used by plaintiffs to generate a higher level of statistical significance.

The aggregation issue is similar but not identical to the issue of whether a system-wide class action is appropriate. The propriety of a system-wide class is to some extent bound up with the merits of plaintiffs' substantive pattern or practice claim: If plaintiffs can prove

that a pattern or practice of discrimination occurs at each institution, this might provide the nexus between the eight institutions and the Board necessary to support a system-wide class. See Opinion and Order of August 10, 1984 at 13-15. Plaintiff's statistical evidence attempts to prove that such a pattern or practice of discrimination exists at the institutions. Logically, however, aggregating statistical results over all institutions in order to prove that a pattern or practice of discrimination exists at each institution "puts the cart before the horse". If plaintiffs' statistical evidence does not show statistically significant sex-based differences at four of the eight institutions, for example, this is information that must be considered by

the court when it determines both whether a system-wide class is appropriate and whether system- wide aggregation is appropriate.

The propriety of aggregating statistical results over all eight institutions is to a large degree a factual issue rather than a legal one. The propriety of aggregating statistical results in any given set of circumstances turns on facts peculiar to the situation under study. As discussed elsewhere, the Board has little or no influence over individual employment decisions made at the institutions. Indeed, high-level administrators at the various institutions often have little or no influence over employment decisions; the majority of employment decisions are made at departmental levels. The court finds that it is more appropriate to

examine the statistical results at each institution than to rely on the aggregated results. The court can obtain no more information regarding the existence of a pattern or practice of sex discrimi nation in the Oregon State System of Higher Education by examining aggregated results than it can by examining each of the individual results. The primary effect of aggregation is simply to produce higher t-values due to the increased number of observations. In light of the hypothesis plaintiffs are attempting to prove with the statistical evidence, aggregated results are less probative than the results from each individual institution.[6]

Interpretation of Regression Analysis Results Footnotes

1. For example, coefficients may be expressed in absolute dollar amounts. See, e.g., Ex. 8202. In such a case the coefficient represents the actual change in salary in dollars associated with a unit change in the explanatory variable. Because most of the regressions in this case are in logarithmic form, the coefficients generated by the regressions are not in easily understood units. Many of the expert witnesses treated the sex coefficients in the logarithmic regressions of salary as representing the average percentage difference in the salary of men and women after the other variables in the models were taken into account. Thus, a sex coefficient in a salary regression of -.10 was said to mean that after accounting for all other variables, women's salaries were on the average 10% lower than men's. However, this is only an approximation; the actual percentage differences differ from the value of the coefficients. See, e.g., Ex. 1, Table 19.

2. This statement is an over-simplification. Because the sex coefficient is a residual variable, it picks up and is affected by (1) biases in the other variables that are related to sex; (2) the effect of technical phenomena such as interaction and attenuation; and (3) the omission of variables from the model that are related to sex. The statement is only true if the regression model is "perfect."

3. The discussion herein assumes that the pattern of variance for all coefficients conforms to a normal, bell-shaped curve, pattern of distribution.

4. Generally, a t-value of 2.0 or greater is accepted as sufficient for a finding that a regression analysis coefficient is statistically significant. See Hazelwood School District v. United States, 433 U.S. 299, 308, 311 ns. 14, 17 (1977); Castaneda v. Partida, 430 U.S. 482, 496 n. 17 (1977). Most of the experts at trial also agreed that the two-standard- deviation test was generally accepted among statisticians and social scientists. However, the court is conscious of the fact that the two-standard-deviation test is arbitrary, and that there is no significant practical difference between a t-value of 2.05 and a t-value of 1.95; both indicate that the result obtained was not likely due to chance variation. Rather than use the two-standard-deviation rule as a hard and fast test, the court will use it as a rough approximation of the magnitude of statistical significance required before a result can be considered probative.

5. The Board tested the extent to which a very small number of cases may affect the statistical and practical significance of regression results by performing an "outlier" analysis, described more fully in the section on salary. This study tends to show that the removal of a very few individuals can have a great effect on regression analysis results.

6. The court is aware that some

courts have relied upon aggregated statistical results over geographically dispersed offices. See, e.g., Segar v. Civiletti, 508 F.Supp. 690 (D.D.C. 1981), aff'd sub. nom. Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984); United States v. County of Fairfax, 629 F.2d 932 (4th Cir. 1980), EEOC v. Akron National Bank, 497 F.Supp. 733 (N.D. Ohio 1980). However, in none of these cases does it appear that aggregation was at issue in the case. Nor is it clear in these cases the extent to which the central body played a significant role in the employment decisions at issue. Other courts have questioned the propriety of allowing class actions (and by implication aggregation of statistical results) over geographically dispersed offices. See, e.g., Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304 (9th Cir. 1977). Finally, in pattern or practice cases brought by the EEOC, or in private actions brought prior to the Supreme Court's decision in General Telephone Company of the Southwest v. Falcon, 457 U.S. 147 (1982), no compliance with Rule 23 was required in EEOC cases, and a much less strict adherence to the requirements of Rule 23 was required by courts in private actions.

COURT'S ANALYSIS OF RANK ISSUE

Plaintiffs' regression analysis models do not contain a variable representing a proxy for productivity. Plaintiffs' regression analysis models on salary assume that faculty members who were of the same age at the time they were first hired, who were first hired in the same year, who have the same degree or degrees, who received their degree or degrees in the same year, and who work in the same discipline are to be paid the same salary.[1] The Board objects to this assumption because it does not account for differences in productivity or academic merit among faculty members.

The Board contends that this flaw in plaintiffs' regression analyses models can be corrected by adding rank as a variable for productivity. The Board

argues that rank is a rough proxy for productivity or academic merit, because advancement to higher rank occurs when a faculty member has performed well enough that, given the standards of the institution and of the department, an advancement in rank is justified. Although rank is not a perfect proxy for productivity or academic merit, it has the advantage of being an objective piece of data that is available on the data base used by the parties. Other, more accurate measures of academic merit--teaching ability, scholar ship and research, and institutional and community service -- are difficult to quantify and hence difficult to use in a mathematical model.

Plaintiffs object to the use of rank in the regression analysis models. They argue that because rank and promotion

decisions are made by the same individuals responsible for salary decisions, the same discriminatory biases that create salary disparities will operate to create rank disparities. Hence, plaintiffs argue that rank is a "tainted" variable, because it contains elements of sex discrimination. If rank is a "tainted" variable, then the use of rank as a model will result in a positive adjustment to the sex coefficient, because part of the measure of sex discrimination will be shifted from the sex coefficient and will become "hidden" in the "tainted" rank variable.

Plaintiffs' regression analysis models assume that a faculty member's degree, when it was obtained, discipline, and longevity explain all differences in salary. The anecdotal evidence, however, is overwhelming that a faculty member's

academic merit, as measured by the quality of teaching, scholarship, and research, along with service to the institution and the larger community are important and determinative factors in decisions relating to salary, rank, and tenure. Without a variable in their regression analysis models for productivity or academic merit, plaintiffs are in the position the Ninth Circuit warned against in Spaulding--namely, relying on statistics "generated from input that failed to control for exactly those differences between individuals that can legitimately lead to their being treated differently." Spaulding, 740 F.2d at 704. If rank is a sex-neutral, rough proxy for productivity and academic merit, it is appropriate to use as a variable in the regression models. However, if rank is

not sex-neutral, its use in the regression models may be inappropriate. Therefore, the court must study rank to determine whether it is sex-neutral.

Plaintiffs' Studies on Rank

As to the class as defined by the court in its August 10, 1984, order, plaintiffs presented two studies on rank. The first is an ordered logistic regression analysis done separately for each of the eight institutions for the year 1979-80, the results of which are shown in corrected Table 4 of plaintiffs' rebuttal report, Ex. 2782(c).[2] The variables used in the model are the standard "new model" variables: highest degree (with separate indicator variables for Ph.D., M.A., or B.A.), years since each degree was received, age at the time of first being hired into the Oregon State System of Higher

Education, years since the time of first being hired into the Oregon State System of Higher Education, whether degrees received were received during employment within the Oregon State System of Higher Education, and discipline variables representing groupings of departments. Research assistants, research associates, and "support faculty" (defined as those in the ranks of instructor through full professor having FASOM[3] codes between 100 and 1999, inclusive) are excluded from the class studied by the model. The model includes senior researchers in the academic ranks and all those at the instructor rank, including part-time, non-regular instructors, both of which should have been excluded from the model in order for the model to conform to the court's Order of August 10, 1984. The rank regression is first run using the

rank of instructor as one value (coded "0") and all higher ranks as the other value (coded "1"), then run with assistant professor coded "0" and all higher ranks coded "1", and finally with associate professor coded "0" and full professor coded "1".

The results of this model are as follows: first, the sex coefficients at all of the smaller institutions (Western Oregon State College, Eastern Oregon State College, Southern Oregon State College, and Oregon Institute of Technology) for all three runs are not statistically significant at the two standard deviation level.[4] At Southern Oregon State College, the sex coefficients are all positive. This shows that after accounting for all of the variables in the model, women are generally in higher ranks than men. At

the remaining smaller schools, the sex coefficients are negative, but not statistically significant. Hence, Ex. 2782(c) shows no statistically significant evidence of sex discrimination in rank at four of the eight institutions. At the larger schools (University of Oregon, Oregon State University, Portland State University, and Oregon Health Sciences University), statistically significant negative sex coefficients occur at all three levels at all schools, except the "assistant professor vs. higher rank" level at Oregon State University.[5] Assuming the validity of plaintiffs' model, these results would tend to show that there is a difference in rank between men and women at the larger schools that is not explained by any of the variables in the model.[6]

Evaluating the practical significance of plaintiffs' ordered logistic regression analysis of rank is not an easy task. Because the regression analysis is a logistic regression analysis, the sex coefficients in Ex. 2782(c) represent the logarithm of the ratio of the odds of a man being in the higher group to the odds of a woman being in the higher group after all qualifications represented as variables in the equation are accounted for. (See Ex. 13(c); Testimony of Fred Ramsey, Tr. 1740-45.) These sex coefficients are not readily understandable, and plain tiffs did not make them any more so in their rebuttal report. However, in the statistical evidence presented with plaintiffs' first report, plaintiffs used the sex coefficients generated by an ordered logistic regression analysis

to create a more comprehensible set of figures, reflected in Exs. 13(c) and 14(b). Plaintiffs' constructed hypothetical predicted male and female rank distributions such that (1)when they were added together they resulted in the same overall distribution as actually exists in the Oregon State System of Higher Education, and (2)the odds ratios as between the male and female hypothetical distributions matched those generated by the ordered logistic regression analysis. The result was the generation of male and female rank distributions representing those predicted by plaintiffs' model. The predicted and actual distributions for women are:

RANK	PERCENTAGES		
	Predicted	Actual	Difference
Full Prof.	9.9	9.4	-0.5

Assoc. Prof.	26.9	20.7	-6.2
Asst. Prof.	36.4	37.2	+0.8
Instructor	26.8	32.9	+6.1

See Exs. 13(c) and 14(b).

The two distributions are remarkably similar. Women occupy the lower ranks with more frequency than predicted and the upper ranks with less frequency than predicted.[7] Assuming that plaintiffs' model is perfect, 13.6% of women faculty members are in an improper rank. Because increasing the rank position of one woman simultaneously results in a decrease in the percentage of women in the lower rank and an increase in the percentage in the higher rank, dividing 13.6% by two will give a rough approximation of the percentage of women in the system as a whole who are discriminated against in rank placement because of sex.[8] That figure is 6.8%. One issue is whether, even if plain

tiffs were to prove that 6.8% of the women faculty members had been discriminated against with respect to rank placement, this would be sufficient to support a finding that discrimination in rank placement at the various institutions is the "standard operating procedure -- the regular rather than the unusual practice." Teamsters, 431 U.S. at 336. The court now turns to the Board's position regarding rank.

Defendant's Criticisms of Plaintiffs' Rank Studies

The Board contends that plaintiffs' model is not valid and is misleading. The Board's first criticism is that plaintiffs' model is premised on an erroneous view of how rank assignments are made by the institutions. The Board points out that plaintiffs' model operates as if all faculty members at

each institution are lumped together and then "assigned" to a rank based on certain qualifications. The evidence shows, however, that, in general, the rank assignment of any given faculty member at any given time is determined by two factors: (1)the rank at which the faculty member was hired; and (2)any subsequent promotions to higher ranks. Faculty members are not hired and then assigned to a particular rank. Instead, faculty members are hired for positions that already carry a particular rank assignment. Advertisements for academic positions are both rank and position specific. The timing of a faculty member's promotion tends to depend on the particular department or discipline. Similarly, there are differences in departments as to the number of years of experience required outside the

institution before new faculty may be hired at a rank higher than the assistant professor entry level.

The Board argues that its studies are more tailored to the processes that actually determine rank levels than is plaintiffs' "snapshot" regression analysis model.[9] The Board contends that the court should give its studies more probative value. The general criticisms made by the Board of plaintiffs' salary studies are also made as to plaintiffs' rank studies. (See infra Evaluation of Statistical Evidence in Support of Class Claim).

Defendant's Studies on Rank

In addition to criticizing plaintiffs' studies, the Board presented studies of its own to show that rank is not influenced by sex. The Board first addresses the issue of rank at the time

of hiring. Although the use of the variables "degree" and "years since degree" inaccurately measure the quantity of actual prior academic experience and does not measure the quality of that experience, the Board uses these two variables to examine the issue of rank at the time of hiring. The Board's leading expert, Dr.Bernard Siskin, performed a relatively simple analysis. He first separated those newly hired with terminal degrees from those newly hired without terminal degrees and ran separate analyses for the two groups.[10] At each institution, Dr. Siskin listed all those newly hired from 1978 to 1983 by discipline group, in order of years since highest degree, and noted the rank of the position into which each was hired. This documentation generated a list such as the hypothetical

that follows:

TERMINAL DEGREE HOLDERS
Department X

Name	Sex	Years Since Degree	Rank at Hire
A	M	1	Assistant
B	M	2	Assistant
C	F	2	Associate
D	F	4	Associate
E	M	6	Associate
F	F	7	Associate

Dr.Siskin then went through these lists and drew a line at the point where the data indicated the break occurred between the higher and the lower ranks. He also noted the sex of those individuals "mispredicted" by his model (such as "C" above). The results of this study are presented in Tables 17-20 of Dr.Siskin's report (Ex.8186).[11] The results show two things: First, Dr. Siskin's statistical model accurately predicts a high percentage of actual ranks. Second, among those individuals "mispredicted" by the analysis, there is no pattern

adverse to women. This study, which is more closely tailored to the way initial rank determinations are made than plaintiffs' model, shows no evidence of discrimination by sex in initial rank position.

Dr.Siskin also did a regression analysis of rank at the time of hiring, again separating those with terminal degrees at the time of hiring from those without terminal degrees at the time of hiring. He first used as variables only sex and years since degree. The results[12] (Tables 21A and 21B of Ex. 8186), show that for those with terminal degrees sex is not a statistically significant factor in determining rank at the time of hiring. Indeed, at four institutions, the sex coefficients are positive (women appear to be favored). For those without terminal degrees, statistically

significant sex coefficients occur only at Oregon State University and Eastern Oregon State College, although most of the non-statistically significant sex coefficients are negative.[13]

The Board next studied the second element of rank: promotions. Even if women are not discriminated against with respect to rank at the time of hiring, if (1) women are less frequently promoted than men, or (2) if it takes longer for women to obtain promotions, then differences in rank between men and women may appear later. To study this issue, Dr.Siskin again used a simple statistical technique: he looked at the actual promotion decisions made at each institution from 1978-1983, grouping the decisions by level (i.e., "Promotion to Associate Professor" and "Promotion to Full Professor"), but not controlling for

qualification differences. One analysis was on a "promotion decision" or "event" basis, a second on a "person promotion decision" basis.[14] The results of this analysis are presented in Tables 9-14 of Ex.8186. These analyses show that there are no statistically significant differences in the treatment of men and women at any institution with respect to promotion in rank. However, the number of observations at the institutions is small, which lessens the statistical significance of the results. Furthermore, the data upon which the studies are based come from the institutions themselves and were supplied to Dr. Siskin for purposes of this litigation.[15] More often than not, women show a higher percentage of denial of promotion than do men.[16] Finally, because in some institutions a faculty

member must be nominated by his or her department to be considered for promotion, any discrimination in the nomination process will not be reflected in Dr.Siskin's analysis. To see if discrimination in nomination exists, Dr. Siskin compared the number of women actually considered for promotion as shown by his data to the number of women "expected" to be considered for promotion based solely on time in rank. The results (Table 16A and 16B of Ex. 8186) generally show that there are no statistically significant differences between the actual and expected number of women considered for promotion, except at Oregon State University and the Oregon Health Sciences University School of Dentistry in the "event basis" analysis. At the smaller schools the differences are negligible; at the University of

Oregon, Portland State University, and Oregon State University, the differences are larger and adverse to women, although still not statistically significant.[17]

Dr. Siskin also did an analysis similar to his "rank at hire" analysis described above to study actual rank position. In this study, he again separated those with the terminal degree from those without the terminal degree to predict rank on the basis of years since highest degree. He did the study separately by discipline, again because the evidence shows that significant differences exist between departments as to the amount of experience necessary before a promotion in rank occurs. The results[18] again indicate that this simple model is a very good predictor of rank, and that there is no pattern

adverse to women in those "mispredicted" by the model.

Finally, Dr. Siskin studied the average time in rank before promotion for men and women, again differentiating between those with terminal degrees and those without terminal degrees.[19] With one exception, there are no statistically significant differences between the length of time men and women stay in a given rank before promotion to a higher rank. The one exception is Eastern Oregon State College, where for promotions to full professor women average four years less in the lower ranks than men do. Generally the differences between men and women are small in absolute terms, and frequently women are shown spending less time in rank before promotion than men. This result is generally similar to the

result shown by an earlier study done by plain tiffs. (See Ex.18.)

Plaintiffs also presented an analysis of rank in connection with their computer matching study. Plaintiffs' matching study compared 169 male-female pairs who matched on department, highest degree, and service year. Of the 169 pairs, in 102 cases the man and woman were of equal rank; in 44 cases the man had the higher rank; and in 23 cases the woman had the higher rank. The Board argues that this difference may be explained by factors other than those taken into account in matching the pairs. Dr. Siskin examined those cases in which pairs did not match on rank, to see if the rank mismatches could be explained by another factor, years since degree, a rough proxy for overall experience. For each mismatched pair, Dr.Siskin

calculated the difference between the years since degree of the higher-ranked individual and the years since degree of the lower-ranked individual. He then considered a higher rank in a pair to be "explained" if the higher ranked individual had a greater number of years since highest degree. If the lower-ranked individual had more years since highest degree, or if the individuals had the same number of years since highest degree, the mismatch remained "unexplained." The results (Ex. 8190; the unexplained mismatches are circled) show that out of 66 mismatched pairs, 41 are "explained" by differences in years since highest degree. Of the 25 remaining mismatches, 17 favor men and 8 favor women. If the "others" institution is excluded (and most of these individuals may no longer be in

the present class), 18 mismatches remain, 12 favoring men and 6 favoring women. Of the 12 mismatches favoring men, 5 occur at one institution (Portland State University). If Portland State University is excluded, out of 103 pairs at the seven remaining institutions there are 13 "unexplained" mismatches, men having the higher rank in 7 cases, and women having the higher rank in 6 cases. Hence, plaintiffs' matching study, when refined by Dr.Siskin's simple explanation, provides no evidence that a pattern or practice of discrimination against women exists with respect to rank.

Vita Matching Study

In an attempt to respond to the Board's criticism that plaintiffs' statistics do not account for any differences in productivity or academic

merit among faculty members, plaintiffs' expert, Dr.Mary Gray, performed a vita-matching study, set out in Ex. 2782 at 103-111. The study purports to show that among the 43 pairs of men and women who were matched, the men and women have equal publication records, equal prior experience, and equal college-level experience, but that the women receive lower salaries than the men.

The women in the study are all either plaintiffs or class members who testified at trial. The men with whom the women are matched were selected by plaintiffs or class member witnesses. When dealing with a small number of cases such as this, it is critical that the cases studied be a random sample of the population. Furthermore, some of the women were matched with men in departments other than their own. Some

of the women are in departments that plaintiffs excluded from their rebuttal report regression analyses as being outside of the class as it was defined by the court on August 10, 1984. Finally, the vitae used to compare the man and the woman were frequently for different years. For example, in one case the man's vita was prepared in 1975 or 1976 and the woman's in 1983. (Tr. 22,430-431).

The methodological flaws in the vita-matching study diminish the study's probative value to the extent that the court declines to draw any inferences from the study.

Court's Conclusions on Rank

The ultimate issue, then, is the extent to which the statistical and anecdotal evidence taken as a whole indicates that the institutions within

the Oregon State System of Higher Education engage in a pattern or practice of discriminating against women faculty members because of their sex with respect to rank at the time of hiring, promotions, and rank status.

Plaintiffs' regression analysis shows statistically significant differences in the overall rank of men and women at four of the eight institutions, and a statistically significant overall disparity when the results are aggregated systemwide. However, several flaws in plaintiffs' model are apparent. First, the evidence indicates that there are significant differences among departments in the amount of prior experience or years of service at the institution required before a faculty member is promoted to a higher rank. Plaintiffs' model does not

take into account this departmental variation. Second, plaintiffs' highest degree variable does not differentiate between terminal degrees and terminal, non-Ph.D. degrees, yet the evidence indicates that possession of a terminal degree is extremely important in rank decisions. Third, plaintiffs' model does not accurately reflect the way in which rank is actually obtained at the institutions. Finally, the model suffers from all the flaws described at length earlier. Much of plaintiffs' evidence fails to account for differences in qualifications. Hence, plaintiffs' model has minimal probative value.

The Board's statistical evidence more accurately reflects the way rank is obtained in the institutions. The Board's statistical techniques, although mathematically less sophisticated than

plaintiffs' regression analyses, are simple, straightforward, and comprehensible. By analyzing rank issues separately for different departments and for terminal and non-terminal degree groups, the Board's statistics avoid some of the flaws contained in plaintiffs' models.

Plaintiffs' regression models show statistically significant differences in the treatment of men and women with regard to rank at some institutions and in the entire system if the figures are aggregated. The Board's evidence in contrast shows that in the large majority of the cases no statistically significant differences exist. Plaintiffs' computer matching study, when the additional variable of years since highest degree is taken into account, also shows no pattern or

practice of discrimination in rank.

From the statistical evidence taken as a whole, the court cannot say that plaintiffs have met their burden of establishing that discrimination in rank and promotion is the Board's standard operating procedure. Plaintiffs' rank regression analyses suffer from the flaws discussed at length in the Evaluation of Statistical Evidence in Support of the Class Claim. More particularly, plaintiffs' models fail to control for departmental differences in rank and promotion, or for the differences in the way faculty with terminal and non-terminal degrees are treated. The evidence indicates that these factors strongly influence rank and promotion, and that when these factors are taken into account, no statistically significant differences between rank or

promotion rates of men and women remain.

The anecdotal evidence also supports a finding that no pattern or practice of discrimination in rank or promotion exists at the eight institutions. Most of the claims made by named plaintiffs and the anecdotal witnesses involve salary, not rank or promotion. In those cases where rank or promotion is an issue, the evidence indicates that ordinarily rank and promotion determinations are based on collegial evaluations of relevant considerations on an individual-by-individual basis. Two points are important. First, although the decisions on rank and promotion are made on the basis of subjective evaluations of the quality of an individual's relevant qualifications, in most cases, the evidence does not indicate that these

subjective evaluations are being used by decision-makers as a pretext for sex discrimination. The anecdotal evidence simply does not leave the court as factfinder convinced that the allegation made by plaintiffs -- that is, that the subjective evaluation of individual qualifications is a device used as a pretext for a pattern or practice of sex discrimination in rank and promotion decisions --has a basis in fact. Second, the types of considerations that the evidence indicates play a large role in rank and promotion decisions are not included in plaintiffs' regression analysis models.

One issue remains: the propriety of using rank as a variable in other regression studies. Since the court has deter mined that the evidence presented does not indicate that the Board engages

in a pattern or practice of discriminating against women in rank and promotion decisions, plaintiffs' argument that rank should not be included in the regression analysis models must fail unless discrimination in rank occurs on an isolated, sporadic occasion and thus causes rank to be a tainted variable. The court will use rank as a variable in the regression models, but keep in mind that it may be biased by some individual instances of discrimination. Although this is an imperfect course, the alternative is to ignore an objective, quantifiable variable for productivity, that has a great impact on salary level and tenure status.

Rank Footnotes

1. This statement is not entirely accurate unless interaction terms are used in the regression analysis model on

salary to allow for differences in the weight given to variables by disciplines. Plaintiffs do not use interaction terms in their regression analysis model on rank.

2. An ordered logistic regression analysis is used when the dependent variable (that is, the variable the model is attempting to explain, which is rank) is binary or discreet (that is, takes on only two or a limited number of values) rather than continuous (such as salary, which can take on a large number of values).

3. The Board's Financial Administration Standard Operating Manual (FASOM) contains descriptions of the numerical codes used in the Board's personnel data base. The departments having FASOM codes from 100 to 1999 are, generally speaking, regular teaching departments. By excluding other departments from their class definition, plaintiffs have excluded most non-teaching support faculty from the class.

4. The results are:

INSTITUTION	SEX COEFFICIENT	T-VALUE
Instructor v. Higher Ranks		
EOSC	+0.609	0.41
WOSC	-0.449	0.58
SOSC	-0.392	0.90
OIT	+1.290	0.44
Assistant Professor v. Higher Ranks		
EOSC	-0.614	0.82
WOSC	-0.069	0.17

SOSC	+0.071	0.20
OIT	-0.426	0.74
Associate Professor v. Full Professor		
EOSC	-0.691	0.46
WOSC	-0.411	0.96
SOSC	+0.571	1.33
OIT	-2.420	1.00

5. The results are:

INSTITUTION	SEX COEFFICIENT	T-VALUE
Instructor v. Higher Ranks		
U of O	-0.327	1.25
OSU	-0.693	3.07
PSU	-0.359	1.40
OHSU	-0.739	3.00
Assistant Professor v. Higher Ranks		
U of O	-0.518	2.45
OSU	-	-
PSU	-0.472	2.42
OHSU	-0.545	1.95
Associate Professor v. Full Professor		
U of O	-0.746	3.06
OSU	-0.607	2.33
PSU	-0.725	2.92
OHSU	-0.854	2.56

Plaintiffs' model did not produce a value for OSU in the "Assistant Professor v. Higher Ranks" category.

6. Plaintiffs also presented a regression analysis of rank done on what plaintiffs term "defendant's class," data generated by plaintiffs by excluding from their original data base those faculty members listed in the Board's "exclusion lists," (Exs. 8168A-F). In this study plaintiffs not only use their uncorrected

data base, but also the regression model used in Exhibit 1, which uses as variables age at hire, years of service, highest degree (Ph.D. or no Ph.D), years since highest degree, ethnic code, whether or not the highest degree was received after hire, and discipline. Because the Board's exclusion lists related to the Board's corrected data base, certain individuals not in the Board's version of the class could yet remain in plaintiffs' version of "defendant's class." An individual excluded from the Board's data base for some reason prior to the class redefinition would not be on the exclusion lists, and hence would remain in plaintiffs' "defendant's class" but not be in the Board's version of the class. Nevertheless, the results of this regression analysis (Ex. 2812A) are similar to those in corrected Table 4 of plaintiffs' rebuttal report -- mostly negative, not statistically significant sex coefficients at the smaller institutions and negative and sometimes statistically significant sex coefficients at the larger institutions.

7. Given the importance of having a terminal degree on rank placement, and the fact that faculty who possess terminal degrees are treated differently in terms of proceeding through the ranks than faculty who do not possess terminal degrees, an argument can be made that plaintiffs should have run the ordered logistic regression analysis separately for those with terminal degrees and those without terminal degrees.

8. The court does not mean by this hypothetical to make a finding that 6.8 percent of the female faculty members state- wide have in fact suffered discrimination in rank. Differences may be due to non-discriminatory reasons that are unaccounted for by plaintiffs' model, or, by flaws in the model itself.

9. Plaintiffs' "snapshot" regressions also incorporate discriminatory actions taken outside of the relevant time period.

10. With reference to rank at hire, possession of a terminal degree usually changes the "entry level" rank from that of instructor to that of assistant professor. Hence, it is appropriate to study those with terminal degrees and those without terminal degrees separately with respect to rank at hire and promotion, as the two groups are in fact treated differently in most instances at the eight institutions.

11. The results are:

WITH TERMINAL DEGREE

Instit.	Number of Cases	Predicted Correctly %	Errors Favoring M	Errors Favoring F
EOSC	16	93.8	0	1
OIT	8	87.5	0	1
WOSC	11	100.0	0	0
OSU	190	92.6	4	10
SOSC	21	85.7	1	2
U of O	160	93.8	8	2
PSU	78	89.7	5	3

Medical	85	85.9	8	4
Nursing	10	100.0	0	0
Dental	22	86.4	2	1

(Ex. 8186, Table 19). (Footnote 11 continued on the next page.) (Footnote 11 continued)

WITHOUT TERMINAL DEGREE

EOSC	17	88.2	2	0
OIT	43	81.4	2	6
WOSC	26	80.8	3	2
OSU	107	87.9	9	4
SOSC	27	81.5	1	4
U of O	55	92.7	1	3
PSU	64	76.5	4	11
Medical	9	88.8	0	1
Nursing	45	77.8	5	5
Dental	4	100.0	0	0

(Ex. 8186, Table 17).

12. The results are:
PERSONS WITH TERMINAL DEGREES

Model A: (Sex and Years Since Degree)

Institution	Sex Coefficient	Units of St. Dev.
EOSC	+0.145	0.38
OIT	+0.410	1.34
WOSC	-0.280	1.46
OSU	+0.007	0.11
SOSC	-0.003	0.02
U of O	+0.012	0.16
PSU	-0.138	1.04
Medical	-0.066	0.42
Dental	-0.003	0.01

Model B: (Sex, Years with Degree, and

Department Groups)

OSU	+0.059	0.78
U of O	-0.053	0.67
PSU	-0.295	1.96

(Ex. 8186, Table 21A). (Footnote 12 continued on next page.)

(Footnote 12 continued)
PERSONS WITHOUT TERMINAL DEGREES

Model A:	(Sex and Years Since Degree)	
EOSC	-0.599	2.38
OIT	-0.321	1.95
WOSC	-0.068	0.36
OSU	-0.216	2.10
SOSC	+0.021	0.09
U of O	-0.202	1.11
PSU	-0.073	0.53
Medical	-0.275	0.68
Nursing	+0.160	0.26
Dental	+0.500	0.61
Model B:	(Sex, Years with Degree, and Department Groups)	
EOSC	-0.616	2.38
OIT	+0.065	0.23
WOSC	-0.141	0.80
OSU	-0.188	1.69
SOSC	-0.035	0.11
U of O	-0.090	0.69
PSU	-0.024	0.15

(Ex. 8186, Table 21B).

13. Dr.Siskin testified that this "Linear Additive" regression analysis model was not a statistically proper technique to use when the dependent variable is discreet. He also ran a

"step-wise" logistic regression analysis of rank at the time of hiring, which he testified was a more proper statistical technique to use when the dependent variable is discreet. The model also allowed for interaction between years since degree and department. The results (Tables 22A and 22B of Ex. 8186) purport to show that sex is not a statistically significant factor in rank at hire except at the University of Oregon with respect to terminal degree holders. However, the methodology of this regression was not fully comprehensible to the court, and hence it is difficult to evaluate its results.

14. In an "event" or "promotion decision" analysis, each decision to promote or not to promote is counted separately, so that if in the relevant time period an individual was denied a promotion twice and then finally promoted, the tables would report two denials and one approval. In the "person promotion decision" analysis, only the final outcome is counted; that is, the above example would be counted as one approval.

Plaintiffs argue that this study and other studies done by the Board that examine decisions made in the period from 1978-1983 are defective in that some of the decisions to promote women under study were made after the filing of this lawsuit. Plaintiffs argue that the Board may have corrected its discriminatory behavior after the lawsuit was filed, and that for this court to allow the Board to use post-filing data in its studies gives

distorted results. However, an examination of plaintiff's studies, which were usually done year-by-year for each institution, convinces the court that this criticism is not valid. Plaintiff's data generally does not show substantial differences in results of regression analyses done in the years preceding the filing of this lawsuit as compared with the years after the filing of the suit.

15. In their rebuttal report, plaintiffs attempt to show that Dr.Siskin's promotion and tenure data are inaccurate. The material in the rebuttal report covers only Western Oregon State College, and was developed by Dr.Anna Penk "by examining records, files and/or contacting individuals in cases of contradictory information." (Pl. Rebuttal Report Ex. 2782 at 47). However, Dr.Penk never testified with respect to this material, and the experts who did testify about the content of the rebuttal report indicated that they knew nothing about the information in this section. In such circumstances, the court is not prepared to discount the accuracy of Dr.Siskin's data, particularly in light of the testimony of Dr.Fred Ramsey that, in the small number of cases he checked, Dr.Siskin's data was generally more accurate than plaintiffs' computer data base.

16. Given what the evidence shows about the average relevant qualifications of men and women in the Oregon state system, however, this result is to be expected.

Plaintiffs also presented an

analysis of the relative rates of promotions of men and women, using rank changes as indicated by the Board's tapes and minimum year-in-rank criteria to determine "opportunities" for promotion. Exhibit 16 presents the results, which indicate that statistically significant differences in the promotion rates of men and women from assistant professor to associate professor and from associate professor to full professor exist. However, this study does not account for differences in qualifications or disciplines. The study also aggregates the results system-wide without providing institution- by-institution results. Finally, the study was made on the class as defined prior to the August 10, 1984 order, and hence includes research and support faculty. The probative value of this study therefore is negligible.

17. The Portland State University result is perplexing, because testimony indicates that at Portland State University, unlike most other institutions, every faculty member is automatically considered for promotion without the need for nomination by a department. Yet on an "event basis," Portland State University has the largest discrepancy between expected and actual female promotion considerations. Dr.Siskin's results for Portland State University are as follow:

	PERCENT DENIED			
	EVENT BASIS		PERSON BASIS	
RANK PROMOTED TO	M	F	M	F

Full	85.7	89.2	61.2	74.3
Assoc.	66.2	75.0	43.2	55.8
Assis.	63.6	65.7	55.6	40.0

None of the results are statistically significant, even though the number of observations is fairly high. Although women have a slightly lower promotion rate than men, this study does not control for differences in qualifications.

18. Dr.Siskin's results were:

Analysis of Relationship Between Rank Assignment 1979-80 and Years Since Degree: Instructor Versus Higher Ranks Persons With Non-Terminal Degree

Inst.	# of Cases	% Predicted Correctly	Errors Favoring M	F
EOSC	28	92.9	2	0
OIT	105	93.3	1	6
WOSC	50	92.0	4	0
OSU	156	97.4	0	4
SOSC	56	96.4	0	2
U OF O	93	100.0	0	0
PSU	99	92.9	5	2
Medical	12	100.0	0	0
Nursing	53	84.9	3	5
Dental	8	87.5	0	1

(Ex. 8186, Table 62).

Analysis of Relationship Between Rank Assignment 1979-80 and Years Since Degree: Assistant Versus Higher Ranks

Persons With Terminal Degree

Inst.	# of Cases	% Predicted Correctly	Errors Favoring M	Errors Favoring F
EOSC	33	97.0	1	0
OIT	17	76.5	0	4
WOSC	118	89.8	4	8
OSU	833	93.3	21	35
SOSC	133	93.2	4	5
U OF O	566	94.2	14	19
PSU	394	92.6	13	16
Med.	237	85.2	18	17
Nurs.	710	0.0	0	0
Dental	75	85.3	2	9

(Ex. 8186, Table 64).

19. Dr.Siskin's results were:

Average Time in Rank:Promotion to Full Academic Faculty Only

	Male		Female		Units of Standard Deviation	P	Sign
	n	Avg	n	Avg			
All	5	9.0	2	5.0	3.78	0.0	Yes*
TD	5	9.0	2	5.0	3.78	0.01	Yes*
NTD	0	-	0	-	-	-	-
All	12	5.8	1	8.0	0.81	0.44	No
TD	(no females)						
NTD	9	6.0	1	8.0	0.68	0.52	No
All	10	3.7	2	4.5	0.76	0.47	No
TD	8	3.8	2	4.5	0.63	0.55	No
NTD	(no females)						

O U	All	86	7.9	9	8.3	0.44	0.66	No
	TD	83	7.9	7	8.0	0.08	0.94	No
	NTD	3	7.7	2	9.5	0.48	0.67	No
S SC	All	25	8.0	3	9.3	0.90	0.38	No
	TD	24	8.0	1	6.0	1.04	0.31	No
	NTD	1	7.0	2	11.0	0.46	0.73	No
U of O								
	All	41	7.8	2	6.0	0.72	0.48	No
	TD	35	8.0	2	6.0	0.78	0.44	No
	NTD		(no females)					
P U	All	59	6.8	9	8.2	1.05	0.30	No
	TD	46	6.6	6	9.3	1.80	0.08	No
	NTD	13	7.6	3	6.0	0.59	0.57	No
Medical								
	All	22	6.9	7	7.6	0.54	0.59	No
	TD	22	6.9	7	7.6	0.54	0.59	No
	NTD	0	-	0	-	-	-	No
Nursing								
	All	0	-	0	-	-	-	No
	TD	0	-	0	-	-	-	No
	NTD	0	-	0	-	-	-	No
Dental								
	All		(no females)					
	TD		(no females)					
	NTD	0	-	0	-	-	-	-

(*)=favors females

Note: TD = cases possessing terminal degree in application year

NTD = cases not possessing terminal degree in application year

(Tr. 8186, Table 15A).

(Footnote 19 continued on next page.)

tnote 19 continued)

Average Time in Rank: Promotion to Associate Academic Faculty Only

Male		Female		Units of Standard Deviation	P	Sign
	Avg	n	Avg			
6	8.7	1	6.0	0.72	0.51	No
5	8.0	1	6.0	0.54	0.62	No
	(no females)					
15	6.5	1	5.0	0.90	0.38	No
		(no females)				
12	6.4	1	5.0	0.84	0.42	No
23	9.1	8	6.9	1.08	0.29	No
10	4.3	5	5.8	1.06	0.31	No
13	12.8	3	8.7	1.59	0.14	No
112	5.1	15	5.3	0.26	0.79	No
107	5.0	13	5.2	0.43	0.67	No
5	8.4	2	6.0	0.53	0.62	No
10	7.7	8	6.8	0.75	0.47	No
8	7.4	4	5.3	1.61	0.14	No
2	9.0	4	8.3	0.25	0.81	No
0						
53	5.8	21	6.5	1.41	0.26	No
35	5.1	14	6.2	1.66	0.10	No

TD	18	6.9	7	7.0	0.04	0.97	No
J							
1	46	5.6	19	6.0	0.35	0.73	No
TD	35	4.8	9	3.8	0.95	0.35	No
D	11	8.1	10	8.0	0.04	0.97	No
edical							
l	39	5.1	9	5.1	0.09	0.93	No
D	39	5.1	9	5.1	0.09	0.93	No
TD	0	-	0	-	-	-	No
rsing							
l		(no males)					
TD		(no males)					
D	0	-	-	-	-	-	-
ental							
l		(no females)					
		(no females)					
TD		(no females)					

te: TD = cases possessing terminal degree in application year
NTD = cases not possessing terminal degree in application year

x. 8186, Table 15B).

Average Time in Rank: Promotion to Assistant Academic Faculty Only

Male		Female		Units of Standard Deviation	P	Sign
n	Avg	n	Avg			

OSC

1	3.0	2	5.0	0.0	1.00	No
4	4.5	4	4.0	1.00	0.36	No
2	4.0	1	3.0	0.0	1.00	No
1	11.0	4	6.0	1.52	0.23	No

(no females)

0						
1	-	0	-	-	-	No
2	2.01	0	6.2	1.21	0.26	No

cal (no males)

ng (no males)

al						
1	-	0	-	-	-	No

Only cases not possessing terminal degree in application year

8186, Table 15C).

0. Dr. Siskin apparently lost one pair from analysis.

COURT'S ANALYSIS OF SALARY ISSUE

Plaintiffs allege that the institutions within the Oregon State System of Higher Education engage in a pattern or practice of discrimination against women faculty members because of their sex by paying women faculty members less than similarly situated male faculty members. In order to prove this allegation, plaintiffs performed statistical analyses of salary. The Board also performed its own statistical analyses of salary.

Average Salary Comparisons

Plaintiffs first ran average salary comparisons which either failed to control for differences in qualifications or controlled for only one qualification (such as having a Ph.D.) at a time. Although these analyses showed

statistically significant differences between the salaries of men and women, they are of little probative value because they did not control for differences in relevant qualifications.

Regression Analyses of Salary

Plaintiffs then ran regression analyses of salary. Table 1 of plaintiffs' rebuttal report, Ex. 2782, shows the results of plaintiffs' regression analyses of salary on the new class.[1] These regression analyses use data corrected by use of the anomalies program discussed earlier, and the following explanatory variables:

highest degree (Ph.D., M.A., or B.A.)
years since highest degree[2]
age at hire
years of service
whether highest degree was obtained after hire
discipline (in Model 2)[3]

The results, using Model 2B, are set out

in Ex.2782, Table 1, as follows:

INSTITUTION/ YEAR		SEX COFF	T	R^2
EOSC	'78	-.0981	3.20	71.7%
	'79	-.0924	3.00	79.4%
	'80	-.0743	2.25	84.9%
	'81	-.0649	2.34	87.2%
	'82	-.0728	2.10	73.3%
	'83	-.1026	2.89	67.9%
WOSC	'78	-.0486	2.62	78.3%
	'79	-.0493	2.61	76.8%
	'80	-.0753	4.13	78.5%
	'81	-.0484	2.55	77.9%
	'82	-.0549	2.87	78.8%
	'83	-.0783	3.28	71.1%
SOSC	'78	-.0370	1.43	68.6%
	'79	-.0656	2.36	70.0%
	'80	-.0522	2.11	73.7%
	'81	-.0761	3.16	73.6%
	'82	-.0313	1.27	76.5%
	'83	-.0310	1.07	68.4%
UofO	'78	-.1031	6.71	71.4%
	'79	-.0948	6.23	72.0%
	'80	-.0880	5.72	72.1%
	'81	-.0894	5.78	71.4%
	'82	-.0882	5.73	72.6%
	'83	-.0851	4.95	68.8%
OSU	'78	-.1002	5.74	62.7%
	'79	-.0925	5.00	62.6%
	'80	-.1017	6.02	65.2%
	'81	-.0955	5.93	66.5%
	'82	-.0912	5.67	69.5%
	'83	-.0590	3.45	70.5%
PSU	'78	-.0737	4.29	62.7%
	'79	-.0894	5.46	66.4%
	'80	-.0904	5.31	62.4%
	'81	-.0873	5.28	62.7%
	'82	-.0715	4.11	62.5%
	'83	-.0616	3.53	58.3%
OHSU	'78	-.2039	4.39	52.6%
	'79	-.1660	3.56	48.0%
	'80	-.2105	5.63	62.0%
	'81	-.1126	3.16	62.9%
	'82	-.1287	2.63	40.5%
	'83	-.1058	2.63	48.3%
OIT	'78	-.0826	1.94	54.6%
	'79	-.1008	2.41	58.5%
	'80	-.0587	1.33	53.0%
	'81	-.1012	2.61	51.3%
	'82	-.1206	3.06	53.9%
	'83	-.1211	2.81	53.7%

Plaintiffs argue that their regression analyses show a consistent pattern of negative sex coefficients and these negative sex coefficients prove that the Board engages in a pattern or practice of sex discrimination against women faculty members on the basis of salary. The Board makes general and specific criticisms of plaintiffs' regression analyses of salary and presents its own analysis of salary.

Specific Criticisms

The Board first points out that from year to year the people being studied at each institution change very little,

while from year to year there are dramatic fluctuations in the sex coefficients at the individual institutions. For example, the sex coefficients at Oregon Institute of Technology range from -.0587 in 1979-80 to -.1211 in 1982-83; at Oregon Health Sciences University, from -.2105 in 1979-80 to .1058 in 1982-83; at Western Oregon State College, from -.0753 in 1979-80 to .0484 in 1980-81. See infra, p. 2 Court's Analysis of Salary Issue.

Second, the Board points out that there are significant differences in the predictive ability of plaintiffs' model both between institutions and between years at individual institutions.[4] Plaintiffs' model predicts best at the small undergraduate liberal arts or teaching institutions -- Western Oregon State College, Eastern Oregon State

College, and Southern Oregon State College -- where salaries are more likely to be determined by degree and longevity, variables used in plaintiffs' model; plaintiffs' model fits less well at the larger research universities-- University of Oregon and Oregon State University -- where pay decisions are more likely to be determined by individual qualifications or quantity or quality of research, variables not used in plaintiffs' model. The Board contends that plaintiffs' model works least well (and in fact is totally inappropriate) for the two most distinctive institutions -- Oregon Institute of Technology, where the emphasis is most often on practical experience rather than academic credentials; and Oregon Health Sciences University, where the faculty is heterogeneous.

Finally, the Board points out that the sex coefficients as a rule tend to be smaller at the smaller liberal arts institutions and larger at the larger research institutions, but that in any event the plaintiffs' model will produce negative sex coefficients even in a discrimination-free environment due to its inherent structure.

Plaintiffs' regression analyses on salary purport to show that, after the variables in plaintiffs' model have been accounted for, there still exists an unexplained difference in the average salaries of men and women in the range of 2% - 13%; however, there is a major flaw in this model. Plaintiffs have failed to include rank or any other variable for productivity as an explanatory variable in the model. The evidence is overwhelming that rank or productivity

is a very important factor in salary level. While plaintiffs argue that rank is a "tainted" variable and should be excluded from the salary model, the court has above determined that plaintiffs have failed to prove that the Board engages in a pattern or practice of discriminating against women faculty members with respect to promotion or rank. Although isolated instances of discrimination in promotion or rank may well have occurred, this is an insufficient reason for excluding rank as a variable in the salary regressions. The court will keep in mind the likelihood of isolated instances of promotion and rank discrimination in analyzing the salary regression studies using rank as a variable.

The Board's Analysis of Salary

The Board's expert, Dr. Bernard

Siskin, also used regression analyses to study the issue of salary. Dr. Siskin used as variables:

degree (terminal or non-terminal)
years at institution differentiated by whether terminal degree was held durin those years
years with degree prior to hire differentiated by whether the terminal degree was held during those years
rank
time in rank
whether the terminal degree was received after the current year[5]
discipline (in Model 2)

(Ex. 8189, pp. 27, 28).

In addition to using different variables from the variables used by plaintiffs, Dr. Siskin did separate analyses for each of the three schools at the Oregon Health Sciences University. Dr. Siskin also removed from his analyses those individuals who had income from a

private practice of medicine or dentistry as a part of their salaries from the Oregon Health Sciences University because he could not determine what proportion of their total salaries came from the institution and what proportion came from their private practices. Although plaintiffs claim that this procedure results in the removal of only "high paid men," there is insufficient evidence in the record from which this conclusion may be drawn. Of the total faculty in the medical and dental schools, 13.5 percent were removed from the analysis. Of this 13.5 percent, 47 were male and 7 were female. It cannot be determined whether this is disproportionate to the number of women with private practices in the schools, or if these are in fact the highest paid faculty members.

Dr. Siskin ran the results for each year from 1977-78 to 1982-83. The years given here are examples of the results from Ex.8186, Tables 24-30:

INSTITUTION	YEAR	SEX COEFFICIENT	T	R^2
EOSC	78-79	+.024	1.01	90%
	79-80	-.003	0.11	89%
OIT	78-79	-.043	1.30	90%
	79-80	-.050	1.56	84%
WOSC	78-79	-.012	0.66	--
	79-80	-.021	1.19	--
OSU	78-79	-.029	2.00	81%
	79-80	-.046	3.75	83%
SOSC	78-79	-.021	1.34	92%
	79-80	-.030	1.91	91%
U of O	78-79	-.030	2.82	90%
	79-80	-.017	1.52	88%
PSU	78-79	-.007	0.53	85%
	79-80	+.009	0.80	86%
Med.	78-79	-.087	2.73	81%
	79-80	-.055	1.67	79%
Dent.	78-79	-.031	0.38	91%
	79-80	+.053	0.56	93%
Nurs.	78-79	-.048	0.41	80%
	79-80	-.034	0.58	88%

The results for Western Oregon State College were testified to by Dr. Siskin and represent the results after the broadly defined FASOM code departments were broken down into more narrow, traditional departments. Dr. Siskin did not testify as to the R^2 for these results; however, the R^2 figure for the original Western Oregon State College analysis was 83 percent.

Dr. Siskin's regression analyses on salary show no evidence of a statistically significant pattern of salary differences between men and women. In those instances where the regression analysis results did show statistically significant differences between the salaries of men and women, Dr. Siskin performed an "outlier analysis." Because regression is an averaging technique, the sex coefficients

may be strongly influenced by a few extreme cases. To test for this possibility, Dr. Siskin identified through a computer program those individuals whose actual salaries were either two standard deviations above or two standard deviations below their salaries as predicted by the regression model. He then removed these individuals and reran the salary regression. Plaintiffs object to this procedure, claiming that it results in the removal of all high-paid men and all low-paid women. However, the court concludes that the outlier procedure is a proper technique and has probative value. The evidence indicates that the individuals identified as outliers either had errors in their actual salaries on the computer data base, or peculiar, non-sex-related circumstances for the

extremely high or low salaries. Moreover, the issue in this case is whether salary discrimination against women is the "standard operating procedure" of the Board. If the Board can show that the removal of a small number of extreme cases results in the disappearance of statistically significant male-female average salary differences, then this undermines plaintiffs' proof of a pattern or practice of salary discrimination. In fact, removal of a small number of outliers has a remarkable impact on the regression analysis results. For example, for Oregon Institute of Technology in 1980-81, removal of two individuals out of 123 results in a decrease of the sex coefficient from -.065 (t=2.22) to -.046 (t=1.75); at Oregon State University in 1979-80,

removal of 45 individuals out of 949 reduces the sex coefficient from -.046 (t=3.75) to -.025 (t-2.42); at the University of Oregon in 1977-78, removal of 33 individuals out of 651 reduces the sex coefficient from -.027 (t=2.39) to-.018 (t=1.99). Removal of outliers also increases the predictive capability of the model.

Thus, the Board's salary regression studies tend to show that no pattern of statistically significant differences in the average salaries of men and women exist at the institutions after accounting for the variables used in the Board's model.[6] Plaintiffs argue that the consistent pattern of negative sex coefficients in the Board's results is indicative of a pattern or practice of sex discrimination even though those negative sex coefficients are

statistically insignificant. However, the Board's regression model suffers from many of the same flaws as plaintiffs' model -- e.g., the "years since" variables overstate the qualifications of women, and the effects of departmental interaction are not accounted for. The pattern of negative sex coefficients in the Board's results is to be expected given the structure of the model, as it is with plaintiffs' model.

Matching Studies on Salary

Both parties conducted "matching studies" on salary. In a matching study, male-female pairs are matched as to certain qualifications. Unlike a regression analysis, which controls for differences in qualifications through algebraic manipulation, a matched pair study involves examining the employment

results of individuals who actually have the same qualifications. A matching study is easily understood, and it avoids some of the technical difficulties of the regression analysis. However, a much smaller sample of the entire targeted population is studied because not every female has a matched male.[7] Nevertheless, matching studies are important statistical tools.

In plaintiffs' matching study, done for the 1979-80 academic year, 169 male-female pairs are matched on the basis of institution, department, degree, and service year. Plaintiffs controlled for years since highest degree by means of a linear regression. The results of the study indicate that the average female salary in the pairs was $677.25 less than the average male salary, with a t-value of 2.33, and each

extra year of service was on the average worth $361.90.[8]

The Board's expert, Dr. Finis Welch, testified as to what he believed were the flaws in plaintiffs' matched pair study. He testified that data errors affected six pairs. Dr. Welch corrected these. He then eliminated nine pairs in which one or both individuals received the degree upon which they matched after 1979, the year the plaintiffs used as the basis for their study. He also eliminated one pair that was matched on the basis of having no degree information available for each indivi dual. After these changes were made, the average salary difference between men and women was reduced to $643.91 (t=2.19). However, when only those pairs holding equal rank were considered, the salary difference was

only slightly adverse to women (a logarithmic coefficient of -.008) and was not statistically significant (t=0.60). Dr. Welch then noted that 35 pairs should be excluded from plaintiffs' regression analyses because they were support faculty. After removing these pairs, the average difference in the salaries of males and females was $496.55 (t=1.44). When only those pairs having equal rank were considered, the average salary difference is $73.08 (t=0.27).

Dr. Siskin also performed a matching study. Dr. Siskin matched male-female pairs as to institution, department, rank, and time in rank (within two years). Dr. Siskin's study did not control for degree or years of service. At Oregon Institute of Technology, Oregon Health Sciences University, and

Eastern Oregon State College, there were not enough matching pairs to allow an analysis to be done. At Southern Oregon State College, the University of Oregon, and Portland State University, the average salary differences were so small that they were not statistically significant and they sometimes favored women. At Western Oregon State College and Oregon State University, the average salary differences between men and women were larger and sometimes statistically significant. See Ex. 8186, Tables 42-46.

The matching studies generally tend to further undercut the results of plaintiffs' regression analyses on salary. When only those pairs in the class are considered, plaintiffs' matching study does not reveal statistically significant differences in the salaries of men and women faculty

members. Moreover, when only pairs of equal rank are considered, the salary differences between men and women are further reduced. The Board's matching studies on salary similarly indicate that in the large majority of cases no statistically significant differences in the salaries of men and women exist.

It is interesting to note the difference in the magnitude of the sex coefficients in plaintiffs' matching studies and plaintiffs' regression analyses. The logarithmic sex coefficient for plaintiffs' matching study is approximately -.030. See Ex. 8202 at 3. The aggregate sex coefficient for plaintiffs' regression analysis of salary is about -.100. The difference suggests that many of the Board's criticisms of plaintiffs' regression models are valid. The difference may

also give a rough approximation of the magnitude of the change in the sex coefficient caused by the flaws in plaintiffs' regression model. If so, it appears that the flaws result in a substantially larger negative sex coefficient. Similarly, the "per-woman shortfall" -- that is, the amount plaintiffs claim represents how much each woman faculty member was underpaid per year because of sex -- as estimated by plaintiffs' regression technique, is $2,276 for 1979-80. Ex. 2782 at 28. Yet the average male-female salary difference from plaintiffs' matching study is $677.

One final study needs to be examined. Plaintiffs' expert, Dr. Ramsey, did an institution-by-institution regression analysis for 1979-80 in which he attempted to respond

to certain objections made by the Board. In this analysis, Dr. Ramsey added as variables certain interaction terms, which attempt to allow for differences in the average value of explanatory variables in different departments. Dr. Ramsey also added rank as a variable. He added these variables one at a time so that the effect of adding the variable could be seen. The results, found in Table 16 of Ex.2782, are as follows: (1) the addition of interaction terms results in a sex coefficient of a smaller magnitude and increases the predictive ability of the model; 2) the addition of rank to the model results in a substantial increase in the model's predictive capacity; the addition of rank also significantly reduces the sex coefficient; in fact, after interaction terms and rank are included as variables

in this model, the aggregate overall salary disparity between men and women is reduced from 20 percent (with no variables whatsoever in the model) to 2.2 percent; moreover, only at Western Oregon State College does the difference remain statistically significant, although at four other institutions the t-values remain above 1.5.

Court's Conclusions on Salary

The issue, then, is whether the statistical evidence taken as a whole and evaluated in light of the other evidence in this case establishes that the Board engages in a pattern or practice of discriminating against women in salary determinations. The court concludes that it does not, for the following reasons:

1. The regression models used by both of the parties tend to produce

negative sex coefficients as a result of their construction.

2. The Board's treatment of outliers indicates how sensitive regression analyses are to a small number of unusual cases and how misleading averages can be; the outlier analysis undercuts plaintiffs' claim of a pattern or practice of discrimination.

3. The anecdotal evidence does not support a finding of sex discrimination in salary determination.

4. Rank or some other measure of productivity is an essential variable for salary studies. When rank is included as a variable in the regression analysis, male-female salary differences at the institution are no longer statistically significant in a high percentage of cases.

5. Even where the differences

between male-female salaries are statistically significant, these differences do not support a finding of a pattern or practice of discrimination. The differences may indicate isolated or sporadic instances of discrimination or they may be caused by flaws in the statistical methodology.

This court does not wish to imply praise or criticism for the salary determination process at the eight institutions. To the casual observer the salary determination process may appear to be a standardless guessing game, lending itself to discriminatory practices. But to the participants in the process it is a painstaking process by which a monetary sum is allocated to the creative contributions of intellectually gifted individuals.

Salary Footnotes

1. Plaintiffs define the new class as all of those women in the ranks of instructor through full professor who are in departments having FASOM codes between 100-1999 inclusive. This definition removes from the class most of the non-teaching support faculty; however, it leaves in the class an unknown but substantial number of instructors who are excluded from the court's definition of the class. Plaintiffs' rebuttal report regression analyses also place those faculty in such units as the Agricultural Experiment Station at Oregon State University and the Crippled Children's Division at Oregon Health Sciences University into their respective institutions, rather than combining them into an "others" institution as plaintiffs had done in their original studies.

2. See the discussion infra, Evaluations of Statistical Evidence in Support of Class Claim.

3. This variable only controls for differences in average salary in the various departments. It does not control for the effects of interaction.

4. Use of a departmental indicator variable will almost always increase the predictive ability of a model.

5. Dr. Siskin included this variable because the factual evidence indicates that individuals who were hired "ABD" (All But Dissertation) -- that is, having only to complete their dissertation in order to receive a Ph.D. -- were treated more similarly to individuals having a Ph.D. than to those who did not have a Ph.D. and were not working toward a Ph.D.

6. The Board also did a linear additive regression of salary at hire for new hires in the 1978-83 period, using as variables (1) whether the individual had a terminal degree, (2) highest degree, (3) year hired (a control for year-to-year differences in annual starting salaries), (4)department, and (5)rank into which hired. The results show no statistically significant differences between the salary at hire for men and women except at Southern Oregon State College. See Table23, Ex.8186.

7. The possibility exists that the males or females matched in a matching study may not be representative of the entire population in terms of relevant qualifications. The plaintiffs examined

this possibility for tneir matching study and determined that there were no statistically significant differences in qualifications between the 169 females matched in the study and females in the Oregon State System of Higher Education generally. See Ex. 2782 at 82-85.

8. As in the regression analysis, two of the four explanatory variables, years of service and years since degree, measure potential rather than actual relevant experience and may be biased in favor of women. However, it is impossible to determine whether this is in fact the case for the 318 individuals in the matched pair analysis, although it would have been an easier task to compute an "actual-years-of-relevant-experience" value for the small number of individuals in the computer matching study.

9. Running a regression department-by-department rather than institution-by-institution seems to be the better method of controlling for departmental interaction. The R^2 value for the University of Oregon using the interaction terms is 73.0%; the R^2 value for the department-by-department regression is 81.4%. See Table 15, Ex. 2782.

10. A department-by-department study at the University of Oregon indicates that significant differences exist in the sex coefficients in different departments. In many departments the sex coefficient was positive -- even though the regression model itself will produce negative sex

coefficients in a discrimination-free environment. The study undermines plaintiffs' claim that sex discrimination in salary is a pattern or practice that pervades the entire Oregon State System of Higher Education.

COURT'S ANALYSIS OF THE TENURE ISSUE

Plaintiffs allege that the Board engages in a pattern or practice of discriminating against women faculty members because of their sex with respect to tenure status in that women faculty members are systematically denied tenure and "placed" in fixed-term rather than tenure-track positions. The Board contends that tenure decisions are made without regard to sex.

Plaintiffs presented no new statistical studies on tenure after the court's order of August 10, 1984, in which the class was redefined.[1] Plaintiffs' original report on the statistical analyses of tenure is similar in structure to their report on the statistical analyses of rank. Plaintiffs first analyzed all raw averages with regard to tenure, then raw averages for

faculty with Ph.D. degrees and raw averages for faculty without Ph.D. degrees. Although these analyses show male-female disparities, they are simple averages which are not significantly probative of discrimination because they fail to take into account other relevant variables.

Plaintiffs rely primarily on their ordered logistic regression analysis of tenure.[2] This study, however, shows that at most institutions there are no statistically significant differences between the tenure status of men and women. See Ex.20. For example, the results for the 1979-80 academic year are: (See next page)

INSTITUTION	Fixed v. Term (Non-tenue track) B	Tenure Track (Not yet Tenured) T	Fixed v. Term (Non-tenure track) B	Fully Tenured T
EOSC	-3.364	0.33	-1.174	1.29
WOSC	+0.364	0.91	+3.870	0.54
SOSC	+0.168	0.32	+0.306	0.63
U of O	+0.167	0.68	-0.509	3.68
OSU	-0.220	1.65	-0.073	0.51
PSU	-0.294	1.43	-0.327	1.73
OHSU	-0.233	1.33	-0.238	1.28
OIT	-0.469	0.64	-0.067	0.15
OTH	-0.393	2.46	-0.176	1.05

See Ex. 2182A.

See Ex. 2182A.

Plaintiffs employed the same procedure used in the rank analysis to convert these coefficients regarding tenure into a more comprehensible form. The results of this conversion are:

AGGREGATED TENURE STATUS OF WOMEN	Actual	Predicted	(8) Difference
Fixed-term	55.8	44.1	+11.7
(Non-tenure-track)	12.1	10.9	+ 1.2
Tenure-track	32.1	45.0	-12.9
Tenured			

Although the magnitude of the differences when aggregated is substantial, most of the differences at the institutions when studied individually are not statistically significant. Moreover, plaintiffs' tenure regression analysis models the tenure process less well than any other employment factor. Tenure-track, like rank, is position-specific; an individual is ordinarily hired into a position that is denominated fixed-term or tenure-track, rather than first being hired and then being "assigned" a tenure-track or fixed-term designation. More importantly, tenure is ordinarily either granted or denied to those in tenure-track positions after completion

of six years of service. If tenure is not granted, then a faculty member in a tenure-track position is usually terminated after being given one year's notice. Tenure is then a double-edged sword: those in tenure-track positions have the potential for long-term job security, but they also face an "up or out" situation at the end of six years. If a position denominated tenure-track becomes available, often a fixed-term faculty member will be considered for the tenure-track position, with some or all of the fixed-term service time counting towards tenure. This may be negotiated between the faculty member and the institution and varies from person to per son and institution to institution. Hence, the fixed-term/tenure-track line is not hard and fast.

Two facts are clear: first, plaintiffs' regression analysis on tenure fails to adequately model the tenure-status process; the institutions do not, as plaintiffs' model implies, consider the qualifications of all faculty members yearly and then "assign" a tenure status to them.[3] Moreover, plaintiffs' model does not reflect the importance of the sixth-year "up or out" decision. Second, faculty members who are granted tenure have only the prestige and the security of their positions as advantages over non-tenured faculty.[4]

In contrast to plaintiffs' statistical analysis of tenure, the Board's model more accurately reflects the tenure status decision-making process. Dr. Siskin first studied the outcomes of actual tenure decisions made

during the period of 1978-1983, recording a granting of tenure if an individual was granted tenure at any time during the period.[5] The results of this study (Ex. 8186, Table 3) show no statistically significant differences in the tenure denial rates of men and women during the period 1978-1983. Dr. Siskin next studied the actual tenure status of newly hired faculty in the same period. The results (Ex. 8186, Table 4) show that no statistically significant differences exist between newly-hired men and women in assignment to tenure-track or fixed-term positions except at Oregon State University and Portland State University.[6] Dr. Siskin then studied whether the differences at Oregon State University and Portland State University were due to some factor other than sex. He first used rank as an explanatory

factor; his results (Ex. 8186, Table 5) show that for newly hired faculty at Portland State University and Oregon State University who were hired into the ranks of instructor, associate professor, and full professor, there are no statistically significant differences in tenure status. However, at both schools a statistically significant difference remained between men and women hired as assistant professors. Dr. Siskin next studied whether departmental differences might explain this result. He found that in those departments having both men and women faculty members, no pattern of assigning women to fixed-term positions and men to tenure- track positions exists. (Ex.8186, Table 6.) Dr. Siskin's conclusion -- that the apparent sex-related differences at Oregon State University and Portland State University

in the tenure status of newly hired faculty are due to departmental differences[7] -- seems borne out by these studies.

Dr. Siskin also did a "snapshot" regression analysis of tenure status similar to plaintiffs, but with certain modifications that take into account the tenure decision process. First, Dr. Siskin examined whether faculty members with six or more years of service were tenured or not tenured. In this analysis he controlled for rank by running separate analyses for each rank at each institution and thereafter aggregating the results. The results (Ex. 8186, Table 7) show no statistically significant differences in the tenure status of men and women with six or more years of service when rank is used as a variable. Dr. Siskin did a similar study

for faculty with less than six years of service. The results (Ex. 8186, Table 8) show that only at Oregon State University are there statistically significant differences in the proportion of men and women in fixed-term and tenure-track positions. Given the results of the department-by- department study done earlier, this result, which does not take discipline into account, is not surprising.

Plaintiffs also studied tenure status as a part of their computer matching study discussed earlier. Of the 169 pairs matched by plaintiffs, in 138 cases the tenure status of the man and the woman was the same. Among those pairs in which the tenure status differed, in 21 cases the man had the higher tenure status, and in 10 cases

the woman had the higher tenure status.[8]

After evaluating the statistical evidence relating to tenure, the court concludes that plaintiffs have not met their burden of establishing that the Board engages in a pattern or practice of sex discrimination with respect to tenure status. The reasons are as follows: First, plaintiffs' ordered logistic regression analysis does not show statistically significant male-female differences at most institutions. To the extent that plaintiffs' ordered logistic regression analysis shows differences adverse to women, the differences are overstated due to the flaws in plaintiffs' model discussed earlier and, specifically with regard to tenure, due to the fact that plaintiffs'

model poorly reflects the actual process of tenure decisions.[9]

Finally, even were the court to consider plaintiffs' matching study to be a perfect one, the results from that study are simply not indicative of a pattern or practice of sex discrimination in tenure status that pervades the entire Oregon State System of Higher Education. At most, plaintiffs' statistics on tenure reflect the existence of isolated or sporadic instances of discrimination against women in tenure status.

Most importantly, the anecdotal evidence does not support plaintiffs' allegations. The evidence indicates that tenure decisions are very important to the institutions -- and for very good reasons: a grant of tenure commits the institution to a life-long personal and

financial relationship with a faculty member. The evidence indicates that in general tenure decisions are made with great care, and are based on considerations unrelated to the sex of the faculty member under consideration. Much of the tenure evaluation process is subjective. However, the court is not convinced that this subjective tenure evaluation process leads to a pattern or practice of adverse treatment of women because of their sex.

Tenure Footnotes

1. After the August 10, 1984 order in which the class was redefined, the court allowed plaintiffs to introduce new, case-in-chief studies on the newly redefined class as a part of their "rebuttal report" prior to the presentation by the Board of its statistical evidence. Plaintiffs did not do this. Rather, plaintiffs offered into evidence the tenure regression analysis of the newly defined class as "rebuttal" evidence after defendant had presented its statistical evidence. The court excluded this evidence because it does not rebut the Board's interpretation of the new class, nor does it rebut the Board's methodolodgy. There is no reason why plaintiffs could not have presented the new tenure study during the time allotted to them by the court for presentation of new case-in-chief studies on the newly defined class. Even were the evidence admitted, however, the court's determination of the tenure matter would not change.

2. The ordered logistic regression procedure, and the meaning of the coefficients, is explained supra at . This study uses Model 1A, which does not account for differing proportions of tenure status in different departments.

3. The plaintiffs' regression analysis of tenure also suffers from the possibility that it reflects the effect of pre-statute of limitations period decisions that are no longer actionable in this case. See the discussion supra

at .

4. Plaintiffs' regression analysis also suffers from the general flaws discussed earlier. Also, the class analyzed by plaintiffs in this regression includes research assistants and research associates, who are not ordinarily eligible for tenure. This may skew plaintiffs' results, because although research assistants and associates may have high "years since" variable values, they will be in fixed-term positions.

5. Hence, if a faculty member was denied tenure one year and granted tenure the next, the individual would be recorded under "tenure granted."

6. In these studies no differences in qualifications were taken into account.

7. Plaintiffs' logistic regression analysis of tenure does not account for any departmental differences in tenure status.

8. Plaintiffs also did a classification analysis of tenure status. See Ex. 1 at 18a; Ex. 1A (errata for table). The classification analysis produced results similar to those produced by the ordered logistic regression analysis, and is subject to similar criticisms. See the discussion supra at .

COURT'S ANALYSIS OF THE ADMINISTRATIVE RESPONSIBILITY ISSUE

Plaintiffs allege that the Board engages in a pattern or practice of discriminating against women faculty members because of sex by denying them advancement into positions of administrative responsibility.

The only statistical evidence that plaintiffs offered to prove this claim was contained in Higher Education General Information Survey (HEGIS) reports along with information found in the catalogs of the various institutions, tabulated in Exhibits 3772-U and 2069A. These exhibits examine the distribution of men and women in administrative positions at the eight institutions. Ex. 2069A was created by Dr. Roberta Hall from information contained in catalogs for the 1983-84 academic year. It shows the

following distribution:

POSITION	NUMBER OF MEN	NUMBER OF WOMEN
President	8	0
Vice President	9	1
Asst. to President	2	6
Dean or Director	190	30

Ex. 3772-U was prepared by Dr. Madronna Holden from information contained in HEGIS reports for the academic years 1972-73 and 1976-77 and catalogs for the academic year 1980-81. It shows the following distributions:

POSITION	YEAR	NUMBER OF MEN	NUMBER OF WOMEN
President	72-73	7	0
	76-77	8	0
	80-81	8	0
Vice Pres./ Provost	72-73	33	0
	76-77	40	4
	80-81	14	1
Dean/ Assoc. Dean	72-73	26	2
	76-77	45	5
	80-81	72	13

Apart from limited anecdotal evidence, this is all of the evidence presented by plaintiffs in support of their

administrative responsibility claim.

This evidence is insufficient to establish that the Board engages in a pattern or practice of denying positions of administrative responsibility to women. The evidence establishes that few women are in administrative positions; the evidence does not establish, however, that the male-female distribution in these positions is disproportionate to the male-female distribution in the pool of faculty qualified for such positions.

Statistics showing an apparent underrepresentation of females in an employment category are of little or no evidentiary weight on the issue of sex discrimination without a showing of the proportion of females in the pool of applicants qualified for the position. See Hazelwood School District v. United

States, 433 U.S. 299, 308 (1977); White v. Washington Public Power Supply System, 692 F.2d 1286, 1289 (9th Cir. 1982); Hagans v. Andrus, 651 F.2d 622, 627 (9th Cir. 1981), cert denied 454 U.S. 859 (1982) (evidence of a low percentage of women in a position "is meaningless without evidence that there existed somewhere a pool of women applicants qualified to assume [the position]."); Pack v. Energy Research & Development Corp., 566 F.2d 1111, 1113 (9th Cir. 1977). The court cannot draw an inference from the evidence presented by plaintiffs that the Board engages in a pattern or practice of denying positions of administrative responsibility to qualified women because of their sex. Plaintiffs cannot prevail on this portion of their class claim.

CONCLUSION

Named Plaintiffs' Claims

Twenty-two named plaintiffs presented 58 individual claims of sex discrimination in conditions of employment while employed by the Oregon State Board of Higher Education. Of the 58 claims presented, the court determined that an inference of sex discrimination could be drawn in three of those claims, and thereafter found for the plaintiffs on those three claims.

Dr. Joanne Amspoker prevailed on the only claim she made, a salary claim. Dr. Anna Penk prevailed on one of her four claims, a promotion claim. Dr. Mary Ann Petry prevailed on one of her three claims, a tenure claim. All three women are from Western Oregon State College.

The named plaintiffs' individual claims do not provide any basis for this

court to conclude that the Oregon State Board of Higher Education engages in a pattern or practice of sex discrimination. The named plaintiffs' individual claims do not bolster the statistics which form the basis of the class action claim.

Why did so few named plaintiffs prevail on so few claims? First, the named plaintiffs presented very little direct evidence of sex discrimination. Compare International Brotherhood of Teamsters v. United States, 431 U.S. at 338, n.19, quoted infra, Intro. - Class Claim, p. 4. Second, discriminatory acts prior to 1972, when Title VII became applicable to the Oregon State Board of Higher Education, are not actionable unless they constitute a continuing violation. The continuing effects of specific, time-barred discriminatory acts

will forever go uncompensated. Third, Title VII is of no avail to those plaintiffs who made comparable worth claims without more. See, e.g., Polly Fisher, Sherry Mihel, Betty Leonard. Some plaintiffs did not adequately explain the basis of their claim. See, e.g., Margaret Lumpkin's retirement claim. Some plaintiffs felt that if they were competent to fill a position, they need not be qualified to fill the position. See, e.g., Diana Kale's claim that a Ph.D. degree was not necessary. Some plaintiffs mistook the consequences of financial disasters and budget cuts for sex discrimination. See, e.g., Carol Rathe and Barbara Stewart. Some plaintiffs were simply undeserving of better pay, promotion, or other employment benefit.

In each plaintiff's case in chief, she testified on her own behalf about unsatisfactory and unexplainable differences in treatment between her and a male comparator or comparators. In each plaintiff's case, the plaintiff's individual testimony was sufficient to require the Oregon State Board of Higher Education to articulate legitimate, non-discriminatory reasons for the claimed discriminatory treatment. Had the Oregon State Board of Higher Education not come forward with legitimate, non-discriminatory reasons for the treatment complained of by each plaintiff, a majority of the plaintiffs would have prevailed under the McDonnell Douglas scheme discussed Infra, Law Applicable to Named Plaintiffs' Cases. The Oregon State Board of Higher Education not only responded to each of the plaintiffs'

claims, it responded with a storm of explanation. The Board's response was time-consuming, but appropriate in the context of the charges made against it and the law which applied to it. The Board offered nondiscriminatory reasons for each action complained of by the plaintiffs. The Board's explanations for plaintiffs' perceived discriminatory treatment included budget considerations, market competition, quality and quantity of performance, academic qualifications, prior experiences, length of service, and explanations for simple misunderstandings.

Considering the quality and quantity of the Board's explanations, each plaintiff should have come forward with evidence to show that the reasons offered by the Board were a pretext for sex discrimination. In order to carry their

ultimate burden of persuasion, plaintiffs had to show that the Board's explanations were offered to conceal the Board's true purpose of sex discrimination. This portion of the plaintiffs' individual cases was entirely inadequate. Plaintiffs offered almost no evidence to impeach the Board's explanations of the allegedly illegal employment conditions. Without rebuttal testimony to establish that the Board's reasons were a pretext for sex discrimination, the named plaintiffs' individual cases, in most instances, had to fail.

While the McDonnell Douglas scheme is not ritualistic, and while the court was free to decide whether the Board inten tionally discriminated against the plaintiffs based upon all of the evidence before it, the case in chief presented by

each plaintiff was, for the most part, weak; and the rebuttal case presented by each plaintiff was, for the most part, nonexistent.

In most cases, only the named plaintiff testified in support of her individual claim, and her testimony rarely did more than describe differences in employment conditions. Plaintiffs' counsel in his letter of February 4, 1985, states as follows:

The court has made three requests of me.

1. To list the names of witnesses, other than plaintiffs, who testified in support of the individual cases of each of the plaintiffs.

It is our legal position that all of the plain tiff's evidence which establishes a pattern of sex discrimination is relevant to the case of each indivi dual plaintiff. In addition, Dr. Fay Haisley testified in support of the individual case of Dr. Ruth Waugh. Erhard Dortmund testified about subjectivity in decision making at Oregon College of Education, now known as

Western Oregon State College, and this testimony would apply to the individual claims of Dr. Anna Penk, Dr. Joanne Amspoker, and Dr. Mary Ann Petry although Mr.Dortmund did not mention these plaintiffs in his testimony. The testimony of Donna Schantz, Dr. Florence Hardesty, and Dr. Linda Kaeser supported the testimony of plaintiff Polly Ann Fisher, although those witnesses did not mention Ms.Fisher in their testimony. June Dunn's testimony related to the case of plaintiff Betty Leonard, as well as to her own claim of discrimination. The deposition of James Lockwood dealing with the depressed salaries for women librarians was helpful in support of the cases of plaintiffs Sherry Mihel and Lois Schreiner, although Mr.Lockwood did not mention either of the named plaintiffs in his testimony. The testimony of Dr. Darlene Southworth which dealt with subjectivity in decision making at Southern Oregon State College was helpful to the cases of plaintiffs Sherry Mihel and Rosemary Dalton, although Dr. Southworth did not mention either of the named plaintiffs in her testimony. The testimony of Dr. Frances Storrs about subjectivity in decision making at Oregon Health Sciences University was helpful in the cases of Dr. Jane Siegel and Ann Hoffstetter, although Dr. Storrs made no mention of Dr. Siegel in her testimony. (Emphasis added.)

In 55 out of the 58 instances of claimed sex discrimination, the Board adequately accounted for the employment

conditions complained about or adequately refuted the fact that the condition occurred at all. The evidence, taken as a whole or applied mechanically within the McDonnell Douglas scheme, fell short. To prevail on a claim of a systemwide pattern or practice of disparate treatment, a plaintiff must prove an intentional discriminatory motive or animus or must present evidence from which a court may infer an intentional discriminatory motive or animus on the part of a defendant. Plaintiffs' theory of liability as to the Oregon State Board of Higher Education in this case is that the Board did nothing in the face of persistent and overwhelming evidence that discrimination against women is commonplace at the institutions. There are three prongs to plaintiffs' theory:

(1) discrimination against women is commonplace at the institutions; (2) the Board knows this; and (3) the Board took little or no action to address the problem of sex discrimination. Therefore, plaintiffs argue, the court may infer that the Board's inaction was the result of a discriminatory motive or animus.

Plaintiffs' theory fails because they have not proved that discrimination against women is commonplace at the various institutions. No pattern or practice of sex discrimination exists of which the Board should have been aware.

As a matter of official policy, the Board requires that faculty members be treated equally, without regard to sex. The Board requires and supports a policy of nondiscrimination and affirmative action at each institution. The Board

itself and each institution has an affirmative action or compliance officer to oversee implementation of the Board's policies of nondiscrimination and affirmative action. While plaintiffs contend that the affirmative action officers are powerless figureheads, mere window dressing in a storehouse of wholesale discrimination, with one notable exception, the court was impressed with the attitude, sincerity, and diligence of the affirmative action officers in the Oregon State System of Higher Education. Although affirmative action officers are not given the power to overturn employment decisions, they set up and monitor procedures whereby sex discrimination is less likely to occur.

There was some anecdotal evidence of discriminatory statements by a Board

member and of insensitivity to the issues of women in the Chancellor's office. This evidence is not sufficient to support a finding that the Board refuses to act against sex discrimination because of a discriminatory motive. Furthermore, a distinction must be made between the concepts of "nondiscrimination" and "affirmative action." Nondiscrimination is the mandate of Title VII, a Congressional Act, and is the law of the land; affirmative action is a statement of executive policy and is to some degree permissive. Plaintiffs claim that the Board's failure to embrace affirmative action to their satisfaction indicates a discriminatory motive. While insensitivity and inaction may be indicative of discriminatory animus, the evidence does not support a finding of

discriminatory animus in this case. Whatever the differences in employment conditions between men and women in the Oregon State System of Higher Education, they have been explained by the Board on legitimate, nondiscriminatory reasons, except in three instances.

Statistics

Plaintiffs' regression analyses are flawed, and the effect of the flaws in the models is that the regression analyses produce unwarranted negative sex coefficients. This means that the statistical results will show apparent differences in treatment adverse to women even in a discrimination-free environment.

The magnitude of the change in the sex coefficients caused by such flaws is difficult to determine precisely, but is, in any event, significant. This is

demonstrated by plaintiffs' own evidence. Whenever plaintiffs improved their regression analysis models in response to a criticism by the Board, the sex coefficients in the improved models were always reduced, often significantly. Plaintiffs' computer matching study, which avoids some, but not all, of the methodological problems of the regression analysis technique, generated sex coefficients substantially less negative than those generated by plaintiffs' regression models.

The Board capitalized upon the weaknesses in the plaintiffs' statistical evidence to create serious doubts as to what the numbers actually prove. To the extent that the statistical evidence shows any overall differences in male-female treatment, the differences are of such a small magnitude that the court

concludes the plaintiffs' statistical evidence cannot support a finding of a pattern or practice of discriminatory treatment of women throughout the Oregon State System of Higher Education. These differences, if they occur, more probably reflect isolated or sporadic instances of sex discrimination. In light of the court's rulings regarding the named plaintiffs' individual cases and the statistical evidence in the class action claim, the court need not address the class member witnesses' testimony.

The tragedy of this case is that it has taken nearly five years, including nine months of trial, to resolve disputes which should have been resolved more rapidly and readily and with less cost in grievance procedures and administrative hearings.

Counsel shall prepare the

appropriate orders to conform to the court's opinion.

The foregoing opinion constitutes findings of fact and conclusions of law in accordance with Fed. R. Civ. P.52(a).

DATED this 13th day of February, 1985.

Helen J. Frye
United States District Judge

Supreme Court, U.S.
FILED
AUG 27 1987
JOSEPH F. SPANIOL, JR.
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No. 87-195

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ANNA PENK, *et al.*,
Petitioners,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE WOMEN'S EQUITY ACTION LEAGUE AND THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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BRIEF OF THE WOMEN'S EQUITY ACTION LEAGUE AND THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

This brief is filed, with the consent of petitioners and respondents, on behalf of the Women's Equity Action League ("WEAL") and the American Association of University Women ("AAUW"), *amici curiae,* in support of the petitioners.

INTEREST OF THE AMICI

Amici are organizations representing memberships at institutions of higher education—both as students and teachers—and with, as part of their organizational purposes, a strong interest in assuring employment equity

for women in colleges and universities across the country. *Amici* have members who have been, or may potentially be, victims of employment discrimination by academic institutions and have been, or may be in the future, involved in litigation seeking to redress that discrimination. As such, *amici* are concerned that consistent, fair, and understandable standards for judging claims of discrimination in higher education be articulated by the federal courts.

Women's Equity Action League (WEAL) is a national, nonprofit membership organization dedicated to securing legal and economic rights for women through research, education, legislative advocacy and litigation.

The American Association of University Women is open to all graduates who hold a baccalaureate or higher degree from a college or university on AAUW's list of qualified institutions. AAUW promotes equity for women, education, and self-development over the lifespan as well as positive social change.

ARGUMENT

I. The 9th Circuit Court of Appeals ruling in *Penk v. Oregon State Board of Higher Education* effectively eliminates the possibility of establishing pattern and practice cases of discrimination on behalf of faculty plaintiffs.

A. *Congress sought to address specific problems of discrimination against women faculty at institutions of higher education wihch persists today.*

Neither of the two major laws prohibiting sex discrimination in employment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, or the Equal Pay Act, 20 U.S.C. 206(d), originally protected faculty members from discrimination by educational institutions. However, a thorough examination of the status of women and minorities in education during 1971 and 1972 convinced

Congress that discrimination in the nation's educational institutions was a serious and pervasive problem. Thus, in 1972, legislation was adopted to protect professional employees of educational institutions from discrimination; Section 906(b)(1) of the Education Amendments of 1972, Pub. L. 920318, 86 Stat. 235 (1972) amended the Equal Pay Act to cover professional executives and administrative employees, and the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972) removed Title VII's exemption for educational institutions.

In Committee deliberations and on the floor, Congress considered a wealth of data reflecting the low status of women in academia. It concluded that:

> Perhaps the most extensive discrimination in educational institutions . . . is found in the treatment of women. While women are generally well represented in terms of numbers employed, they are generally relegated to the lowest paying and least prestigious jobs. 118 Cong. Rec. S1992 (daily ed., Feb. 1, 1972).

and,

> At institutions of higher education, women are almost totally absent in the position of academic dean, and are grossly underrepresented in all other major faculty positions. [T]his discrimination does not only exist as regards to the acquiring of jobs, but . . . is similarly prevalent in the area of salaries and promotions [.] *Id.*, at S1992.

But after two decades of legislative, administrative and courtroom activism, women who pursue academic careers are still nowhere near equal to their male counterparts in salary, career status or job security. Women are underrepresented on faculties, clustered at the lowest end of the teaching ladder and paid considerably less than their male peers.[1]

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[1] *See, e.g.*, "Women Gain Little in Academic Jobs," *New York Times* article, July 23, 1987.

The proportion of women in the postsecondary teaching force increased by only four percent between 1972 and 1980, from 14.4 to 18.1 percent. Astin and Snyer, "Affirmative Action 1972-1982: A Decade of Response," *Change* (July-August, 1982). Even this increase, however, is not reflected in the higher ranks of academia. Indeed, the same patterns of discrimination evidenced prior to 1972 exist today: the lower the rank, the higher the concentration of women in that rank, with women constituting 53 percent of instructors, 38 percent of assistant professors, 25 percent of associate professors, and only 12 percent of full professors of college faculties. *Survey of Salaries, Tenure, & Fringe Benefits of FT Instructional Faculty* (Higher Education General Information Survey), 1985-86 academic year, National Center for Education Statistics, U.S. Department of Education.

Wage disparities also remain a significant problem. For the 1983-84 school year, women on the average were being paid 82 percent of what men receive, throughout all ranks. *Chronicle of Higher Education*, Vol. 25, No. 4, Jan. 18, 1984, at 20. That gap was wider than in 1982-83, *Id.*, Vol. 25, No. 20, Jan. 26, 1983 at 26, and disparities in salary do not appear to be narrowing.

B. *Judicial "deference" to decision-making in academic institutions has severely limited the effectiveness of Title VII for victims of discrimination.*

Prior to the 1972 Amendments to Title VII, courts generally limited their intervention in academic employment matters to cases where there were clear abuses of discretion or arbitrary and capricious actions. *See, e.g., Green v. Board of Regents of Texas Tech University*, 474 F. 2d 594 (5th Cir., 1973).

But even following Congress' 1972 actions, courts expressed great hesitation in subjecting academic employ-

ment decisions to the same scrutiny applied to other employment settings. The opinion of the 2d Circuit in *Faro v. New York University*, 502 F.2d 1229 (2nd Cir. 1974), reflected the view of many courts a decade ago: "[O]f all the fields which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision." *Id.* at 1231-32. *See also Megill v. Board of Regents of State of Florida*, 541 F.2d 1073, 1077 (5th Cir. 1976); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1371 (W.D. Pa. 1977); *EEOC v. Tufts Institute of Learning*, 421 F. Supp. 152, 158 (D. Mass. 1975).

While in many workplaces subjective hiring practices have been recognized as a potential smokescreen for either unconscious or conscious bias, and have been declared "a ready mechanism for discrimination . . .", *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972), in academia such processes are readily affirmed and rarely examined. *See generally*, B. Schlei & P. Grossman, *Employment Discrimination Law* 199-201 (1983).

In *Clark v. Atlanta University, Inc.*, 15 FEP Cases 1138 (N.D. Ga. 1976), *aff'd*, 548 F.2d 353 (5th Cir. 1977), the District Court took the now commonly expressed position that "academic institutions are unquestionably justified in considering many subjective criteria in determining questions of promotion and compensation in the academic world." *Id.* at 1140.

Moreover, courts in academic cases have insisted that they need not—or should not—evaluate the accuracy or fairness of subjective judgments made by academic decision-makers. In *Zahorik v. Cornell University*, 729 F.2d 85 (2d Cir. 1984), plaintiffs, like those in hundreds

of other discrimination cases against non-academic employers, had sought to show that male candidates of equal or lesser qualifications had received more favorable treatment with respect to tenure than plaintiffs. But the District Court and the 2d Circuit in *Zahorik* determined that it was inappropriate for the courts to review the evaluations of concurrent or previous tenure candidates and compare those reviews to those given to plaintiffs, on the grounds that courts cannot hope to master academic fields sufficiently to resolve differences of scholarly opinion about "merit".

The 2d Circuit has, through the *Zahorik* decision, taken from academic plaintiffs the tool of comparative evidence—the backbone of a disparate treatment case. Scrutiny will be weakest in exactly the place where discrimination enters the system—in the evaluation of competence.

The 7th Circuit has even refused to find discrimination when there is evidence that academic standards have not been applied uniformly. In *Namenwirth v. Board of Regents of the University of Wisconsin System*, 769 F.2d 1235 (7th Cir. 1985), the 7th Circuit affirmed a trial court's conclusion that Plaintiff was denied tenure because she was not held in high enough "esteem" by her colleagues. Evidence showed that reasons given for not tenuring the plaintiff were not used when male candidates of similar background and experience were evaluated, and vice versa. The trial court rejected the argument that this was evidence of discrimination with the explanation that "any one person conscientiously engaged in an effort to apply the standard to different tenure candidates over a period of time could reasonably apply the standard somewhat unevenly among the candidates." *Namenwirth v. Bd. of Regents of the University of Wisconsin-*

Madison, No. 80-C-340-G, slip op. at 7 (W.D. Wis. Oct. 27, 1983) (Decision and Order for Judgment).[2]

These cases are not exceptional. The record of success for individual plaintiffs pressing sex discrimination cases in higher education is a dismal one. Academic plaintiffs, to a greater degree even than other "high level" employees, have not received equal protection from Title VII, despite the deliberate step Congress took to cover them. E. Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982).

C. *Yet courts are searching for effective ways to enforce Title VII as Congress intended through analyzing objective proof.*

In more recent years, courts have come to recognize the dangers of the "hands off" approach. The panel in *Namenwirth*, 769 F.2d 1235 (7th Circuit 1985), wrestled with the problem of how to provide effective review of tenure decisions where the dispositive factor is the ability of the candidate to win the esteem of the very people whose sexual biases are in question. The majority concluded that *individual* plaintiffs may be limited to reliance on a procedural flaw or direct evidence of overt, gender-based hostility. *Id.* at 1243. (See, e.g., *Sweeney v. Keene State College*, 604 F2d 106 (1st Cir 1979), *cert denied*, 444 U.S. 1045 (1980); *Fields v. Clark University*, 817 F.2d 931 (1987).

Earlier, in *Davis v. Weidner*, 596 F.2d 726 (7th Cir. 1979), the same Court cautioned that the continued prac-

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[2] *Amici* take strong issue with the conclusion that the high degree of subjectivity involved renders academic decisions impossible to evaluate. In his dissent in *Namenwirth*, Judge Swygert criticized the majority for its excessive deference to subjective decision-making, and suggested that courts trying to ascertain the existence of unlawful bias need not back away from analyzing subjective academic judgments. He outlined a fair and reasonable way to review these decisions in individual cases. *Id.* at 1244.

tice of minimal judicial scrutiny "could lead to the immunization of higher education from the requirements of Title VII." *Id.* at 731. In fact, even the 2d Circuit has since retreated from its opinion in *Faro, supra,* characterizing minimal scrutiny as an "anti-interventionist policy (that) has rendered colleges and universities virtually immune to charges of employment bias, at least when the bias is not expressed overtly." The Court noted specifically that "far from taking an anti-interventionist position with respect to the academy, the Congress has instructed us to be particularly sensitive to evidence of academic bias." *Powell v. Syracuse University,* 580 F.2d 1150, 1154-55 (2d Cir.), *cert. denied,* 439 U.S. 1130 (1978). Thus there is both confusion and an attempt to find adequate judicial solutions to a clear legislative mandate among several circuits.

D. *Increased reliance on statistical evidence as objective proof may be the only means of resolving the dilemma courts have posed for themselves and for academic plaintiffs.*

It is in part because courts have been reluctant to review subjective judgments by academic faculty and administrators that faculty women have sought, in recent years, to bring class action cases. These cases seek to use statistical proof as a means of demonstrating overall patterns of discrimination. *See, e.g., Melani v. Bd. of Education,* 561 F. Supp. 769 (S.D. N.Y. 1983); *Coser v. Moore,* 739 F.2d 746 (2d Cir. 1984); *Chang v. University of Rhode Island,* 606 F. Supp. 1161 (D. R.I. 1985). They represent a hope that courts will see how the subjective standards relied on by colleges and universities create *not a random result,* but a consistent pattern of employment decisions unfavorable to women faculty. By demonstrating the pervasive patterns of failure to pay, promote and grant tenure in comparable numbers, plaintiffs seek to show that employment decisions at many

institutions are not based on fair and consistent application of standards of "scholarly merit", but on sex.

This Court has repeatedly affirmed the value of statistical evidence in demonstrating discrimination. *Teamsters v. United States*, 431 U.S. 324 (1977), *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

And, ironically, it is the 9th Circuit itself which clearly stated the merits of this approach in the academic context. In *Lynn v. The Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981), that Court affirmed the wisdom of looking to statistical evidence in academic cases, pointing out that such data "is particularly helpful in the academic context, where the [employment decisions are] highly subjective." *Id.*, at 1342. *Lynn* noted that in determining whether "merit" or "sex" played a greater part in an academic judgment, "Often, there is little direct evidence," so that statistical evidence, which "does not deal with the merits of the university's . . . decision" is a particularly effective method of proof. *Id.* at 1342 n.3.

And only last year this Court, in *Bazemore v. Friday*, 106 S.Ct. 3000 (1986), strongly endorsed the use of statistical proof through regression analysis as valuable evidence in seeking to prove a Title VII pattern and practice case brought by professional employees in an academic setting. *Id.* at 3009.[3] However, further guidance by this Court as to the effective use and analysis of this evidence is needed in order to reverse the history of severely restricted remedies available to academic plaintiffs.

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[3] *Bazemore v. Friday*, 106 S. Ct. 3000 (1986), a Title VII class action case based on race discrimination, was brought by black professional employees against the North Carolina Agricultural Extension Service and various counties. Employee class ranged

II. The 9th Circuit decision which is the subject of this petition for writ of certiorari effectively emasculates statistical proofs as probative of pattern and practice discrimination in academia.

The central issue in *Penk v. Oregon State Board of Higher Education*, at the trial court and on appeal, has been the validity of statistical evidence presented by plaintiffs and in large part confirmed by defendant's statistical studies as well. That statistical evidence demonstrated a statistically significant wage, promotion and tenure "gap" between men and women faculty members in similar disciplines with the same levels of education and experience.

The trial court in *Penk* had before it regression analyses demonstrating disparities in wages and promotions between men and women faculty with similar objective qualifications. The central question became what weight to give this evidence in the face of criticisms by defendant that the statistical studies failed to take into account decision-making factors—subjective in nature, sometimes impossible to quantify and often completely unrecorded—which also went into decision-making in the Oregon State System of Higher Education.

The trial court admitted the statistical proof, but found its probative value to be severely undercut by the possibility that the variables which were omitted would, if included, account for the differences in treatment. It put no burden of production, much less persuasion on the defendants. The 9th Circuit Court of Appeals upheld the trial court's decision as essentially a matter of credibility: "The judge was simply unpersuaded." *Penk*, 816 F.2d 458 (9th Cir. 1987).

The 9th Circuit argued that it was not error to discount statistics which, though they might effectively com-

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from local "agents" who implemented education programs on agriculture and home economics to County Chairmen with administrative responsibilities in these areas.

pare the objective qualifications of employees, do not completely "model" the decision-making process. *Penk, supra,* at 12-13. While this form of statistical evidence was not deemed inadmissible, the 9th Circuit determined it to be evidence with very little value. The trial court in *Penk* termed the proof—"fatally flawed." *Penk,* Civil No. 80-436FR, slip op. at 404-406 (D. Ore., February 15, 1985).

Yet the entire value of such statistics is to illuminate potential discrimination against a protected class over a large number of cases. If that is the purpose, one would expect the courts to require the defendants to produce evidence that the actual decision-making process is not biased. If the plaintiff is required to model all subjective factors—for example, collegial views that the candidate is "unpleasant" or "aggressive"—the statistics would reflect the very bias in question. Yet it is on this point that the courts appear confused.

Individual decisions about academic "merit" are rarely, if ever, given a review. The class action vehicle, utilizing statistics, is specifically aimed at eliminating the necessity of weighing the subjective judgments about merits of candidates.

Other circuits have examined regression analyses as proof of discrimination and come to a different conclusion. Before discounting plaintiff's regression analyses for omission of a variable, defendants have been required to make some demonstration that the omitted variable would, in fact, eliminate the disparity shown. *Segar v. Smith,* 738 F.2d 1249 (D.C. Cir. 1984), *Trout v. Lehman,* 702 F.2d 1094 (D.C. Cir. 1983).[4] Plaintiffs in these cases were not required to reproduce exactly the decision-making of the employer—which would, after all, mean reproducing any discrimination which had infected the

[4] *Segar v. Smith,* 738 F.2d 1249 (D.C. Cir. 1984) was a Title VII class action case involving professional level employees called "spe-

process. Moreover, the 1st Cir. in *EEOC v. McCarthy*, 768 F.2d 1 (1st Cir. 1985) found discrimination solely on the basis of a regression analysis using fewer variables than were used in *Penk*.

In fact, this Court in *Bazemore* specifically criticized a trial court for accepting an employer defense made up entirely of pointing out omitted variables *without establishing in any way that if these factors were accounted for, the disparities would disappear.* 106 S.Ct. 3000 at 3010.[5] If defendants had no greater burden, academic plaintiffs would be left with an unacceptable *presumption* that subjective factors of "merit" will weigh against the protected class. *Teamsters v. U.S.*, 431 U.S. 324 (1977),

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cial agents" employed by the U.S. Drug Enforcement Agency. Special agents ranged from GS 7 and 9 through GS 12 and above. Here defendant employer attacked plaintiffs' regression analysis for failing to account for a crucial variable. The Appellate Court affirmed the lower court's ruling that defendant had to do more than cast doubt on its proof and had to "at least make a 'clear and reasonably specific showing,' based on admissible evidence, that the alleged nondiscriminatory explanation in fact explain[ed] the disparity." *Id.* at 1269, quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) at 253-255.

Trout v. Lehman, 702 F.2d 1094 (D.C. Cir. 1983) was a Title VII case against the U.S. Navy brought by both individuals and a class of female professional technical employees in the computer science field. Here the Navy attacked plaintiffs' regression analysis for, again, omitting critical variables related to minimum objective qualifications for positions. Noting that plaintiff need not "present a perfect statistical analysis" to prevail at the prima facie stage, the Court held that defendants had failed either by their own statistical proofs or by reworking plaintiffs' statistics with the omitted factors to explain the disparity. *Id.* at 1101-1102.

[5] In *Bazemore*, 106 S.Ct. 3000 (1986), the lower court held petitioners' regression analyses "unacceptable as evidence of discrimination" because they did not include "all measurable variables thought to have an effect on salary level." *Id.* at 3009. The Supreme Court overruled this finding for, among other factors, the employers' failure to demonstrate that when these factors were properly organized and accounted for, the disputed disparity becomes insignificant. *Id.* at 3010, note 14.

Neal v. Delaware, 103 U.S. 370 (1880). *Penk* leaves plaintiffs with no real possibility of establishing discrimination absent direct proof of invidious intent or without once again resorting to arguments about individual merits which courts are loath to review. What is more troublesome is that despite *Bazemore* real confusion remains concerning the proper treatment of these statistics in a Title VII academic discrimination case.

CONCLUSION

Courts and plaintiffs are in need of guidance as to the appropriate means of proving a case of discrimination in an academic context. Congress sought to protect faculty members from discrimination in the same manner as other employees. Courts must have appropriate tools for fair and effective enforcement. For these reasons, *amici* assert that the time is ripe for this Court to grant the petition for certiorari and to establish the appropriate rules for academic plaintiffs attempting to establish a prima facie case of discrimination under Title VII.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1987

ANNA PENK, *et al.*,
Petitioners,
v.
OREGON STATE BOARD OF HIGHER EDUCATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

The American Association of University Professors files this brief *amicus curiae* in support of the Petition for Writ of Certiorari with the consent of both parties.

INTEREST OF *AMICUS CURIAE*

The American Association of University Professors (hereafter "AAUP" or the "Association") is a national membership organization of 50,000 faculty members and research scholars in all the academic disciplines. Founded in 1915, it is the nation's oldest and largest organization dedicated to the advancement of higher education from the perspective of the faculty as a whole.

One of AAUP's central tasks is the development of statements intended to establish minimum standards of

institutional practice in higher education. Policy statements endorsed by AAUP address the protection of academic freedom and tenure, the role of the faculty in institutional governance, and the elimination of discrimination in academic life.[1] State and federal courts, including this Court, have frequently referred to AAUP policy statements in resolving disputes involving faculty members and their institutions.[2] The Association participates in litigation as *amicus curiae* on a selective basis; it makes here a rare appearance in support of a petition for writ of certiorari.

AAUP has long been concerned with the equitable compensation of faculty members and has addressed this concern both in study and in litigation. AAUP publishes an annual report on the economic status of the professoriate, compiling salary by rank and institution. The report is widely used in the academic community and has been cited by the courts as an authoritative source of information on faculty pay and related issues.[3] In 1977, AAUP published a comprehensive report recommending statistical methods for the comparison of the salaries of women and minority faculty members to those of white males in the institution.[4] Since about the same time, the annual economic report has contained data on

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[1] The major policy statements endorsed by AAUP are compiled in *AAUP Policy Documents and Reports* (1984), a copy of which is in the collection of the Supreme Court library.

[2] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-2 (1971); *Gray v. Board of Higher Educ.*, 692 F.2d 901, 907 (2d Cir. 1982); *Browzin v. Catholic University of America*, 527 F.2d 843 (D.C. Cir. 1975).

[3] *NLRB v. Yeshiva University*, 444 U.S. 672, 703 n.16 (1980) (Brennan, J., dissenting); *Sweeney v. Board of Trustees of Keene State College*, 14 FEP Cases 1220, 1227 (D.N.H. 1977), *aff'd*, 569 F.2d 169 (1st Cir.), *vacated and remanded on other grounds*, 439 U.S. 24 (1978) (per curiam), 604 F.2d 106 (1st Cir. 1979).

[4] Scott, *Higher Education Salary Evaluation Kit* (1977).

the comparative salaries of male and female faculty members which show a persistent discrepancy favoring males. The latest 1986-7 report reveals an actual increase in the disparity since 1977-8 in the ranks of assistant, associate and full professor.

As to litigation, AAUP intervened as a plaintiff in a landmark Title VII action that successfully eliminated the use of sex-based actuarial tables by a major pension plan covering more than 3,000 colleges and universities.[5] The Association participated as *amicus curiae* in the instant case in the Court of Appeals. It also participated as *amicus* in a case involving salary discrimination claims by faculty women at another institution of higher education in Oregon. *Hein v. Oregon College of Education*, 178 F.2d 910 (9th Cir. 1983).

By virtue of its extensive experience in matters of faculty evaluation and compensation and its commitment to equality of opportunity in higher education, the Association is well-situated to address this Court as *amicus curiae*.

INTRODUCTION AND SUMMARY OF ARGUMENT

This class action involves claims of faculty women at the eight institutions supervised by the Oregon State Board of Higher Education (hereafter "the Board") who allege discrimination based on sex in pay, rank, tenure, administrative appointments, and other conditions of employment. The District Court, after a trial, found merit in some of the individual claims but rejected the class claims.

As described more fully in the Petition for Writ of Certiorari, the faculty plaintiffs submitted statistical evidence establishing highly significant disparities between the salaries of male and female faculty members.

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[5] *Spirt v. TIAA-CREF*, 691 F.2d 1054 (2d Cir. 1982), *vacated and remanded*, 463 U.S. 1223 (1983), 735 F.2d 23 (2d Cir. 1984), *cert. denied*, 469 U.S. 1034 (1984).

The Board introduced extensive statistical studies in rebuttal. These also showed disparities which, while less substantial, could not be explained by nondiscriminatory factors. The Board argued that plaintiffs' statistical analyses were defective for omitting variables relating to the quality of performance in teaching, scholarship, and service. It offered no evidence—statistical or otherwise—to show that these factors would actually explain the disparities. The trial court was nevertheless persuaded that these factors were determinative and concluded that both parties' statistical studies were inadequate for failing to incorporate them. The court determined that it was the faculty members' burden to account for these variables and that having failed to do so, they had not proved discrimination. The Circuit Court sustained the District Court's conclusion. 816 F.2d 458 (9th Cir. 1987).

Amicus submits that the lower courts erred profoundly in the requirements for statistical proof that they imposed on the plaintiffs. The Court of Appeals, in reaching its result, misread this Court's recent decision in *Bazemore v. Friday*, 106 S.Ct. 3000 (1986), in such a way as to jeopardize the future implementation of equal opportunity in higher education. Moreover, amicus submits, in accepting the Board's speculation about the inferior performance of women as a class, the court seriously undermined the enforcement of Title VII. We devote our discussion here to the proper standards for establishing, and rebutting, claims of discrimination through statistical evidence, and the proper treatment under Title VII of an employer's claim that the explanation for sex-based disparities may be the inferiority of women as a class.

The Ninth Circuit's decision conflicts with *Bazemore v. Friday*, 106 S.Ct. 3000 (1986), which held that statistical studies may serve to prove discrimination by a preponderance of the evidence without accounting for all measurable factors. Here the appellate court concluded

that variables which the Board raised as merely speculative explanations for the proven discrepancy were indispensable to the faculty members' statistical analysis. This is flatly contradictory with *Bazemore*, as it effectively elevates to the status of "major" factors that *must* be statistically analyzed certain conditions about which the Board only hypothesized. The Court of Appeals surely did not heed its own admonition that courts should not "decide legal propositions on hypothetical evidence." 816 F.2d 458, 465 n.1. Consequently, under the appellate court's approach, a Title VII plaintiff could rely on statistical proof only if the employer lacked the imagination to invent possible variables which the plaintiff might have examined.

The lower court's decision also departs from *Bazemore* in requiring that plaintiffs' statistical studies account for variables which could not be measured. In *Bazemore*, this Court refused to require that the statistical studies include even all *measurable* factors. In contrast, the Ninth Circuit decision requires that plaintiffs perform the impossible task of incorporating into their statistical studies factors that could not be measured because of the absence of data.

To the extent that *Bazemore* may not have expressly rejected the use of speculative explanations to rebut plaintiff's statistically established discrimination, the decision of the court below has created a conflict among the circuits. All three circuits which have considered this issue have uniformly prohibited the use of speculation by employers to rebut plaintiffs' statistical case. In light of the significance of this issue for the future enforcement of Title VII, the Court should grant review to resolve this conflict.

The lower court's decision fundamentally undermines Title VII in accepting the Board's speculative defense that sex-based disparities established by the plaintiffs' statistical studies may be explained by the inferior aca-

demic performance of women faculty as a class. Title VII was designed to eliminate this kind of sex-based stereotype. The lower court's approval of such a speculative explanation effectively stands the statute on its head.

Amicus AAUP urges the Court to grant review, in order to clarify that under *Bazemore*, unsubstantiated speculation about possible explanatory factors is entitled to no weight in rebutting the inference of discrimination raised by plaintiffs' prima facie statistical case, and that a plaintiff's statistical studies need not include variables that could not be measured. Review should also be granted to make clear that speculation about the inferior performance of women (or minorities) as a class is not an adequate defense in Title VII.

ARGUMENT

I. The Ninth Circuit's Decision Conflicts with *Bazemore v. Friday*.

The Circuit Court's decision conflicts with this Court's holding in *Bazemore v. Friday*, 106 S.Ct. 3000 (1986), in two fundamental ways. First, it approves as valid rebuttal evidence defendant's speculative objections to missing factors in plaintiff's statistical studies despite an absence of evidence to demonstrate that the factors could reasonably account for the disparities based on sex. Second, the decision requires plaintiffs' studies to account not only for measurable factors but also for those that could not be measured. We discuss these flaws in the decision in sequence.

A. A Defendant's Unsubstantiated Speculation About Possible Explanatory Factors Cannot Rebut Plaintiff's Statistically Established Sex-Based Salary Inequities.

The Ninth Circuit adopted the District Court's determination that the plaintiffs' studies failed to include "such highly determinative quality and productivity fac-

tors" as the variables of quality of teaching, research, and service. 816 F.2d at 465. It cited no other grounds in the District Court's decision for rejecting the plaintiffs' proof. *Id.* Although the Board claimed that these were determinative factors in the decision-making process, it made no attempt to show, through statistical or any other studies, that these factors would in fact explain the statistical disparities.[6] Such a showing would have had to demonstrate that the performance of women, as a class, was inferior to that of men in the fundamental academic tasks of teaching, scholarship, and service. The lower courts nevertheless adopted the dubious conclusion that these factors "must have had a significant influence on salary and advancement decisions." 816 F.2d at 465.

In contrast, *Bazemore* held that it was error not to accept a multiple regression analysis as proof of discrimination by a preponderance of the evidence because it did not account for "all measurable variables thought to have an effect on salary level." 106 S.Ct. at 3009. While noting that the omission of variables might affect the probativeness of the analysis, this Court ruled that "a [statistical] analysis that included less than all measurable variables may serve to prove a plaintiff's case." *Id.*

The Court made clear that an employer is required to demonstrate the significance of the factors for which it criticizes plaintiffs for omitting. The District Court in *Bazemore* had determined that the plaintiffs' statistical evidence was to be sufficient for a *prima facie* showing

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[6] Indeed, as noted by the Circuit Court, the District Court found the Board's own statistical studies inadequate for this very omission. 816 F.2d at 464. The Board's only "evidence" was testimony that, in individual cases, such considerations were taken into account in setting salaries. As explained below in Section III, this type of testimony has little if any probative value with respect to class-wide differences in performance.

of discrimination.[7] However, it found, as did the District Court here, that the defendants had successfully rebutted plaintiffs' case by articulating "plausible reasons" for the disparity and satisfactorily explaining their validity. The "plausible" defense accepted by the trial court included testimony that nine nonracial factors existed that might explain the disparities, although no evidence was offered that inclusion of these factors would do so. *Bazemore v. Friday*, Civ. No. 2879, Slip Opin. at 133-134 (E.D.N.C. Aug. 20, 1982).

This Court made clear in *Bazemore* that the District Court erred in accepting such explanations when an employer simply declared that "many factors go into making up an individual employee's salary," without making any "attempt that we are aware of—statistical or otherwise—to demonstrate that when these factors were properly organized and accounted for, there was no significant disparity between the salaries of blacks and whites." 106 S.Ct. 3010 & n.14.

Bazemore is consistent with prior decisions of this Court holding that unsubstantiated speculation is entitled to no weight in rebutting a *prima facie* case of discrimination. In *Patton v. Mississippi*, 332 U.S. 463 (1947), the state attempted to rebut statistical evidence of underrepresentation of blacks on juries by suggesting that they lacked qualifications necessary for jury service. The Court responded that if this assumption could be proved, the defendant would have done so. In the absence of such demonstration, it found that the government's

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[7] The Circuit Court fundamentally misread the Court's holding on this matter. Noting that *Bazemore* reversed a lower court for finding certain statistical studies unacceptable as evidence of discrimination, the Ninth Circuit attempted to distinguish the instant case on the ground that the trial court here "admitted statistical multiple regression evidence at trial and then chose to discount the weight of that evidence." 816 F.2d at 464-65. It is plain, however, that *Bazemore* requires more than the mere admission of statistical studies as evidence in a trial.

speculation as to the lack of qualifications "wholly failed to meet" the statistical evidence produced by the plaintiff. 332 U.S. at 468.

Similarly, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), this Court held again that an employer was required to do more than merely hypothesize that certain factors might explain the statistical disparities. "If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made." 433 U.S. at 331.

Under the Ninth Circuit's interpretation here, mere speculation would serve to defeat plaintiffs' case. Permitting a employer to defeat a Title VII plaintiff's case by hypothesizing that omitted variables would explain the disparities poses a serious challenge to the effectiveness of *Bazemore*. It would become virtually impossible for a Title VII plaintiff to prove discrimination through the use of statistics because, as Judge Phillips observed in his dissent from the Fourth Circuit's opinion in *Bazemore*, "it will always be possible for Title VII defendants to hypothesize yet another variable that might theoretically reduce a race-effect coefficient demonstrated by any multiple regression analysis that could be conceived." 751 F.2d 662, at 692-93 (4th Cir. 1984). See also *Guardians Association v. Civil Service*, 630 F.2d 79, 88 n.7 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981).

In this case, the Board proffered no statistical or any other studies to show that performance in teaching, scholarship and service of women faculty, as a class, was inferior to that of their male colleagues.[8] Moreover,

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[8] The only evidence on the effect of performance on salary was anecdotal testimony by witnesses for the Board who stated that factors they considered in setting an *individual's* salary included teaching ability, research, and service. Other factors included market conditions, failure to negotiate harder, inflation, lack of money, budget, unpopular program, and personality. All of this testimony concerned salary decisions involving individuals and has

its own expert, Dr. Siskin, admitted that there was no evidence that factors relating to quality of performance would have an effect on pay disparities. In fact, the only relevant evidence presented on this issue more nearly suggests the opposite view. It revealed that women faculty, as a class, received percentage raises equal to men's during the period under the study, R.T. 22989, 22494-96, hence the quality of the women's performance, as a class, was probably viewed by their institutions as *equal* to that of male faculty members.

B. Plaintiffs Were Improperly Required to Account for Factors that Could Not Be Measured.

Bazemore holds that a plaintiff's statistical studies may prove discrimination even without including all *measurable* variables. By rejecting plaintiffs' studies for failing to account for factors of quality of teaching, service, and scholarship, the Ninth Circuit required that the faculty members' regression analyses include factors which not only cannot be easily measured in statistical terms but which in fact could not be measured in this case because the defendant failed to gather the necessary information. It is no accident that the Board made no attempt to show that factors representing quality of performance would in fact explain the disparities demonstrated by the faculty members' studies. The Board maintained no records from which the performance of individual faculty members could be reconstructed. Hence, to fault the faculty studies for failing to include these factors is to require them, contrary to *Bazemore*, to account for not only all "measurable variables," but also for some variables that could not in fact be measured.

The Ninth Circuit's approach in this case comports with its general requirement of plaintiffs' statistical proof. The standard, which the trial court followed, was

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little probative value regarding the question whether women as a class differed from men with respect to these factors.

set forth in *Spaulding v. University of Washington*, 740 F.2d 686, 704 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984). In that decision, the Circuit Court declared statistics to be deficient which "failed to control for exactly those differences between individuals that can legitimately lead to their being treated differently." *Id.* at 704. This standard is clearly far in excess of what was required by this Court in *Bazemore*, when it stated:

> A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather his or her burden is to prove discrimination by a preponderance of the evidence. 106 S.Ct. 3009.

See also *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In the instant case, the Court of Appeals elaborates on the standard set in *Spaulding* in rejecting as inadequate the standard of proof accepted in the social sciences. 816 F.2d at 465 n.1.

II. Review Should Be Granted to Resolve the Conflict in the Circuits Concerning the Weight of Speculative Explanations.

To the extent that *Bazemore* may not have explicitly rejected the use of speculation to rebut a plaintiff's statistically established case, the Ninth Circuit's decision now creates a conflict in the circuits. As noted above, the court accepted as rebuttal evidence the Board's speculative assertions that certain factors would explain the sex-based disparities established by the faculty plaintiffs' statistical analyses. See Section I. A. *supra*. This decision is squarely in conflict with the holdings of other circuit courts that have considered the issue whether a defendant may rebut a plaintiff's *prima facie* statistical case by speculative objections.

In the District of Columbia Circuit, unsupported speculation was first rejected as evidence to rebut a plaintiff's case in *Trout v. Lehman*, 702 F.2d 1094, 1102 (D.C. Cir. 1983), *rev'd on other grounds sub nom. Lehman v. Trout*, 465 U.S. 1056 (1984) and in *Segar v. Smith*, 738

F.2d 1249, 1287 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). In *Segar*, the appellate court found no evidence to support the government's claim of alleged differences in prior experience between blacks and whites, noting that there was no reason to assume there was such a difference. Moreover, it observed that since the government had not presented any admissible evidence that the purported differential in experience explained the observed disparities, the claim was "mere speculation and conjecture." *Id.* The court went on to observe that, although it was not necessary to rework a plaintiff's statistics, the most effective way to rebut a *prima facie* case was to present accurate statistics in support of the contradictory claim.[9] The employer was required, however, to make "some credible showing that the omission skewed plaintiffs' statistics." 738 F.2d 1287. The District of Columbia Circuit has recently reaffirmed this in *Palmer v. Shultz*, 812 F.2d 84, 99-101 (D.C. Cir. 1987), citing *Bazemore* as support for the rule.

The Second Circuit has adopted the same approach. In *Guardians Association v. Civil Service Commission*, 633 F.2d 232, 240 n.13 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981), when the defendants objected to the adequacy of plaintiffs' statistics concerning the impact of the disputed tests, the court noted that *Dothard*, *supra*, required defendants to present evidence in support of their objections. In accepting plaintiffs' showing of bias in the tests, it commented: "Defendants were unwilling or unable to introduce persuasive evidence indicating otherwise. They introduced no statistics tending to show that even one of the examinations was in fact neutral in impact." *Id.* It thus rejected a rule that

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[9] It noted that, in this case where the plaintiff claimed the factor was too subjective to quantify, the defendant's claim that it was sufficiently objective for quantification was severely undermined by defendant's failure to incorporate the factor in its statistics. 738 F.2d at 1287.

would require a plaintiff to disprove defendant's unsupported objection to its statistics.

The same requirement that an employer provide evidence—and not merely speculation—to rebut a plaintiff's *prima facie* statistical case was adopted by the Fifth Circuit in *Falcon v. General Telephone*, 626 F.2d 369, 380-1 (5th Cir. 1980), *rev'd on other grounds*, 457 U.S. 147 (1982), and *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982). In *Payne*, the court noted the defendant's claim that the plaintiff's statistics had failed to take account of the fact that some black applicants may not have submitted to an interview. It nevertheless rejected that claim because "its major premise is wholly speculative." The only evidence concerning that point was a witness' testimony that he believed most applicants did appear for an interview. 673 F.2d 822. Similarly, the court rejected the defendant's claim that the figures were flawed because of duplicate applications from blacks, when there was no testimony or other evidence in support of such a hypothesis.

The rule adopted by these circuits [10] finds support in the well-settled principle that a litigant normally does not have the burden of establishing facts within the control of the opposing party. As this Court has observed: "The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *U.S. v. N.Y.N.H.R.R.*, 355 U.S. 253, 265 n.5 (1957). This rule makes particularly good sense in Title VII cases where the employer not only has better access to

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[10] The Eighth Circuit refused to accept a defendant's unsubstantiated speculative objection in *Craik v. Minnesota State University Board*, 731 F.2d 465 (8th Cir. 1984). The court rejected defendant's objection to statistical studies that included administrators in the class of faculty, on the grounds that the defendant had failed to offer any evidence that correcting this overinclusion would have an impact on the disparities. *Id.* at 477 n.15.

the data but actually determines whether and to what extent relevant information is gathered. In the instant case, the Board was in a position to establish a systematic procedure for evaluating faculty performance and to collect and organize the data. It failed to do so. See Section I. B. above. Not to impose the burden of substantiating speculative objections on Title VII defendants would simply encourage employers not to maintain records.

III. Approval of Discriminatory Employment Practices on the Ground that Women Are Inferior As a Class in Effect Repeals Title VII.

The Circuit Court's conclusion that quality of teaching, research and service may account for salary disparities between women and men faculty constitutes a tacit assumption that women as a class are inferior to men regarding the fundamental indices of academic performance. Individual differences in ability and performance, of course, may legitimately account for differences in the pay of individuals. In an individual discrimination suit, performance criteria may indeed explain why the plaintiff has the lower salary. But the unsupported claim that women, as a group, are inferior to men in teaching, publication and service perpetuates gender stereotypes that Title VII clearly rejects.

A basic principle underlying equal employment laws is that absent discrimination, women and minorities will perform in the same manner as white males. As the Court explained in *International Brotherhood of Teamsters v. United States*, 421 U.S. 324 (1977), it is this assumption that permits an inference of discrimination from class-wide disparities which cannot be properly explained by factors unrelated to sex or race. *Id.* at n.20. Acceptance of an employer's speculation that class-wide inferiority in quality of performance explains disparities in salary or other terms of employment is wholly at odds

with the fundamental assumption of Title VII. This is not to say that there can never be differences in performance between groups. But if indeed women or minorities, as a class, are inferior in teaching, scholarship and service, it is surely incumbent on the employer who asserts such a claim in a Title VII suit to provide appropriate evidence in support of its argument rebutting a prima facie statistical case.[11]

CONCLUSION

The Court should grant the Petition for Writ of Certiorari in this case, to clarify the legal principles in Title VII cases that employers may not defeat a statistical *prima facie* case by mere unsubstantiated speculation that missing factors would explain the disparities, and the plaintiffs' statistical studies need not account for unmeasurable variables. Review should also be granted to make clear that unsubstantiated speculation about the inferiority of women or minority groups as a class is inadmissible as contrary to the fundamental principles of Title VII.

Respectfully submitted,

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[11] *See Melani v. Board of Regents*, 561 F. Supp. 769, 783 (S.D.N.Y. 1983), where the assumption that women interrupted their careers more often than men was allowed only if supported by statistical evidence.

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No. 87-195

In the Supreme Court of the United States

OCTOBER TERM, 1987

ANNA PENK, et al.,

Petitioners,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Are the district court's findings that defendant did not engage in a pattern and practice of discrimination against women faculty clearly erroneous?

2. Did the courts below correctly allocate the burdens of proof?

3. Did the district court abuse its discretion by excluding two of plaintiffs' witnesses after plaintiffs violated the court's orders to disclose the witnesses' names; and did the court abuse its discretion by limiting the time for rebuttal testimony?

LIST OF PARTIES

Respondent accepts petitioners' statement.

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OPINIONS BELOW

Respondent accepts petitioners' statement.

JURISDICTION

Respondent accepts petitioners' statement.

STATUTES INVOLVED

Respondent accepts petitioners' statement.

STATEMENT OF THE CASE

Respondent rejects petitioners' statement of the case, with the exception of the description of the procedural history, which for the most part is accurate.[1] As discussed below, petitioners' summary of the statistical evidence and their description of the lower courts' opinions are misleading and inaccurate.

The frustrating reality in responding to the petition for certiorari is that this brief cannot possibly set the record straight. Trial of this case generated nearly 25,000 pages of transcript and nearly 25,000 pages of exhibits. The district court's opinion consumes 487 pages, of which more than 120 pages discuss the statistical evidence and the class claim. In such a massive case, it is impossible to summarize succinctly the extensive statistical proofs. It is equally impossible to canvass adequately the other evidence that bears on the class claim. Nevertheless, because the gravamen of petitioners' argument to this Court is that their statistical evidence proved intentional, systematic discrimination as a matter of law, the omissions and misstatements in their summary of that evidence are inexcusable.

Petitioners rely heavily on Exhibit 1, a statistical analysis of a class that differed substantially in size and composition

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[1] Petitioners' last witness testified on May 16, 1984, not May 2, 1984. Contrary to petitioners' assertion (Pet., p. 7), the district court made extensive findings concerning the "extent of the disparity between men and women."

from the class finally defined by the trial court. They cite studies that the district court found had little probative value because of biased variables, poor methodology and failure to model the processes in question. Several of their contentions rest on factual assumptions that the district court expressly rejected.[2] They blithely ignore the bulk of respondent's evidence. Moreover, they fail to acknowledge the nearly wholesale failure of proof in their fifty-eight individual claims, a failure of proof they never seriously disputed on appeal and one that dramatically detracted from any persuasive force of their class proofs. Petitioners have, in short, unfairly cast the evidence in a light most favorable to them, when their obligation is to do precisely the reverse.

The trial judge's 487-page opinion provides the best overview of the evidence, the inferences that it supported, and the inferences that the fact finder permissibly chose to draw. Petitioners have never directly challenged the evidentiary support for so much as one of the trial court's factual findings, and her opinion is therefore the best rebuttal to petitioners' description of this case. Additionally, much of respondent's 148-page brief to the Ninth Circuit was devoted to responding to petitioners' assertions about the proofs, many of which are identical to those that petitioners continue to advance before this Court. Assuming it is necessary to review the evidence for purposes of the Court's consideration of the petition for certiorari, the district court's opinion and the briefs filed in the

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[2] For instance, petitioners assert that their evidence showed "the ultimate control of the Board over the institutions," (Pet., p. 19), while the district court found that "[t]he Board has almost no involvement in work, pay, promotion, and tenure decisions at any institution." (Pet. App. at 11). They state that women "were placed" in fewer tenure track positions, (Pet., p. 16-17), even though the district court expressly found that faculty apply for and are hired into positions which have already been designated as tenure track or fixed term; the tenure status is not assigned after hire. (Pet. App. at 865, 867).

Ninth Circuit can best assist in that review. However, as will be demonstrated below, that review should be unnecessary. At best, petitioners ask the Court to correct perceived errors in applying settled law to disputed facts. Neither their factual description of the case nor the arguments they advance in support of their petition demonstrate a basis for this Court's exercise of certiorari review.

REASONS TO DENY CERTIORARI

I. Introduction.

Petitioners are twenty-two plaintiffs who brought fifty-eight individual discrimination claims on their own behalf and a class action claim on behalf of all women faculty in the Oregon higher education system. In their class claim, petitioners ambitiously assumed the burden of proving a pattern and practice of intentional discrimination at all eight state colleges and universities in the State of Oregon. They attempted to carry their burden of persuasion through the testimony of the named plaintiffs, through more than sixty non-plaintiff "anecdotal" witnesses, and through statistical analyses of salary, rank and tenure. Only three of the named plaintiffs' claims succeeded. All three plaintiffs were from one college, and each prevailed on only one claim. Only one successful claim involved salary. At seven of the eight institutions, petitioners failed to prove even one instance of discrimination. Although the district court's opinion did not specifically address the individual testimony of each of the sixty anecdotal witnesses, the court did consider that evidence collectively. It found, frequently and expressly, that these witnesses' descriptions of alleged discrimination were unconvincing, and thus this evidence did not bolster either the individual or class claims. (Pet. App. at 691, 747, 749-50, 808-09, 813-14, 854-55, 873, 878-79, 890-92).

In reviewing the statistical proofs, the district judge examined the analyses in painstaking detail and simply found peti-

tioners' evidence less persuasive than respondent's. She concluded that a wide variety of factors detracted from petitioners' statistical proofs. These included inherent biases in petitioners' variables which were capable of creating the appearance of discrimination even if none existed (Pet. App. at 699-704); petitioners' use of inaccurate data (*id.* at 731-40); erroneous factual assumptions underlying their statistical models (*id.* at 810); methodological flaws (*id.* at 716-31); failure to account for relevant quality factors (*id.* at 706-13); and the court's doubts about the credibility of petitioners' experts. *Id.* at 686-87. In addition, the district judge reviewed and found probative respondent's statistical analyses, which demonstrated that there was no state-wide or system-wide pattern of statistically significant differences in salaries, rank and tenure after accounting for relevant variables. *Id.* at 838-46 (salary), 795-804 (rank), 867-71 (tenure). Thus, the district judge carefully scrutinized petitioners' statistical evidence. But after evaluating the probative value of that evidence, she declined to draw the inference that the raw disparities generated by petitioners' flawed statistical methodology were the result of systematic, purposeful discrimination.

The Ninth Circuit reviewed the district court's findings under the clearly erroneous standard. Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer*, 470 U.S. 564, 573-75 (1985). It found no error. It also found no legal error in the district court's allocation of the burdens of proof and no abuse of discretion in the trial judge's procedural rulings.

As resolved by the courts below, this case turns on the application of well-settled law, correctly articulated by the lower courts, to an exhaustive and extremely complex factual record. Neither the district court nor the Ninth Circuit had reason to venture into new legal territory, because the grounds for decision were overwhelmingly factual. The class claim and

fifty-five of the fifty-eight individual claims were lost on a straightforward failure of proof.

In their petition for certiorari, petitioners in effect ask this Court to reverse the district court's factual findings and procedural rulings. Those issues do not merit a grant of certiorari. To make those questions appear worthy of this Court's attention, petitioners have substantially misstated both the facts found by the district court and the grounds for decision in both lower courts.

II. This Case Presents No Issue of a Duty to Correct Pre-existing Discrimination.

Petitioners assert that the Ninth Circuit's treatment of their class salary claim departed from this Court's decision in *Bazemore v. Friday*, ___U.S. ___, 106 S.Ct. 3000 (1986). Even if the Ninth Circuit misinterpreted *Bazemore*, which it did not, the misapplication of settled law to this complex factual record would not merit granting certiorari.

Petitioners argue that the Ninth Circuit erred by failing to require respondent to take affirmative steps to correct historical disparity. Their analysis proceeds from a faulty premise. They assume that historical "disparity" is the equivalent of historical "discrimination." In fact, there was no finding of historical discrimination in this case.

The district court expressly and correctly adopted the settled continuing violation rule, reaffirmed by this Court in *Bazemore*, that current discrimination in pay cannot be excused by pointing to time-barred discriminatory decisions as the original source of the discrimination. (Pet. App. at 34).[3] Thus, if the district judge had found historical discrimination that respondent failed to correct, she would have

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[3] Indeed, the district court relied upon *Lamphere v. Brown University*, 685 F.2d 743, 747 (1st Cir. 1982), which petitioners cite as contrary to the Ninth Circuit's position. (Pet. App. at 34).

entered a finding of *present* salary discrimination. She did not make such a finding, however, because she was not satisfied that the historical differences between men's and women's salaries were the product of discrimination. (Pet. App. at 881-95).

Petitioners, nevertheless, contend that the Ninth Circuit, on appeal, held that respondent did not have a duty to correct preexisting discrimination. That is not a fair reading of the court of appeals' opinion. Contrary to petitioners' assertion, the Ninth Circuit did not hold that the failure to correct *discriminatory* disparities in salary is not legally wrong unless based on an improper motive. Rather, it implicitly recognized that purported "disparities" between men's and women's salaries—differences between *average* salaries and differences generated by complex statistical regression analyses using biased variables and poor methodology—did not, standing alone, prove systematic discrimination. *Penk v. Oregon State Bd. of Higher Education*, 816 F.2d 458, 465, 468 (1987). With no finding of systematic discrimination—historical or otherwise—there is no basis for petitioners to argue about the lower courts' application of the legal principles relevant to "continuing violations."

III. The Lower Courts Correctly Allocated the Burdens of Production and Persuasion.

Respondents have difficulty identifying the precise fault that petitioners claim to find in the Ninth Circuit's discussion of the burdens of proof. Their argument appears to rest entirely on the assertion that the Ninth Circuit required too little from defendant in response to plaintiffs' statistical case in chief. Once again, the gravamen of their objection is that the trial judge found respondent's evidence to be more persuasive than theirs and that the Ninth Circuit did not find that conclusion to be clearly erroneous. Petitioners attempt

to convert this into a legal issue by asserting that respondent offered no evidence to explain the salary disparities. Hence, they assert, respondent bore no burden whatsoever. This is plainly false.

One of the ways respondent met its burden of production was to show that there was little in the way of real-life anecdotes of gender-based decision-making to support the inference of discrimination that petitioners asked the court to draw from the sterile statistical numbers. Respondent answered the numerous individual claims with what the trial judge characterized as "a storm of explanation."[4] (Pet. App. at 484-85). The defenses varied with the facts of the particular employment decisions in question, which covered the full range of faculty employment at eight different institutions and dozens of departments with different evaluative criteria. Petitioners provided no rebuttal. In all but three of the fifty-eight claims, the district court found respondent's explanations to be persuasive. The trial court correctly perceived that petitioners' failures of proof in the individual cases undermined their class action assertion that their statistical evidence accurately reflected a "standard operating procedure" of discrimination. *Bazemore*, ___ U.S. ___, 106 S.Ct. at 3008. *See, e.g.*, Pet. App. at 814, 855, 894-95.

Second, respondent criticized petitioners' statistical analyses on a variety of grounds, nearly all of which the district court found probative. For instance, petitioners' three statistical proxies for professional experience—years since receipt of highest degree, years since first hire and age at hire—all measured only *potential* experience and tended to overesti-

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[4] The district court's concluding section lists several: "The Board's explanations for plaintiffs' perceived discriminatory treatment included budget considerations, market competition, quality and quantity of performance, academic qualifications, prior experiences, length of service, and explanations for simple misunderstandings." (Pet. App. at 885).

mate the experience of women faculty as compared to men. This caused petitioners' studies to attribute salary disparities to gender when in fact the disparities resulted from differences in experience. (Pet. App. at 699-704). Petitioners' studies were plagued by other flaws as well. They failed to account for differences in the value that different academic departments attach to various qualifications. (*Id.* at 717-24). Most of the studies used inaccurate data (*id.* at pp. 731-40), and many included faculty who had been excluded from the class. (*Id.* at 787). They omitted rank as a variable, despite its direct influence on salary[5] and despite their inability to establish discrimination in rank (*i.e.*, promotion) decisions. (Pet. App. at 812-14). Numerous other methodological errors and fallacious assumptions biased their studies.[6] Summarizing the impact of respondent's criticisms of petitioners' statistical studies, the trial judge stated:

> The Board has convinced the court that plaintiffs' regression analysis models are flawed. Further, the Board's objections are not merely "unqualified, speculative, [or] theoretical." *Trout* [*v. Lehman*], 702 F2d [1094] at 1102. These flaws in the plaintiffs' models result in larger negative sex coefficients. Hence, the models give the appearance of discriminatory treatment of women even though none may exist.

(Pet. App. at 744-45.) Studies by both parties confirmed the validity of respondent's criticisms: each time either party ran statistical studies that corrected for any of respondent's criticisms, the disparities diminished. (*See, e.g.*, Pet. App. at 721-22, 736-37, 746, 852-53; Ex. 2782, pp. 54, 98 (plaintiffs' exhibit)).

Third, respondent presented its own statistical studies showing that the alleged disparities were due to admitted

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[5] A promotion in rank almost always entails a raise (R.T. 3480, 7457, Ex. 8134 at 68).

[6] *See, e.g.*, Pet. App. at 713-16, 724-31, 774-78, 793-95, 806-11, 834-38, 861-62, 865-67.

differences in the average qualifications, primarily experience, between male and female faculty and to methodological errors in petitioners' studies. The studies showed that when proper variables and methodology were used, there was no pattern of disparities in statistically significant ranges. *See, e.g.*, Pet. App. at 795-806 (rank); 838-46 (salary); 867-71 (tenure); Ex. 8186. Thus, petitioners' assertion that respondent produced no "explanation" for the disparities is false. Respondent's proofs not only demonstrated that the disparities in petitioners' studies were illusory but also established affirmatively the absence of a pattern of statistically significant disparities in pay, promotion and tenure decisions at the eight state colleges and universities.

In their petition, petitioners miscast entirely the thrust of respondent's criticisms of the statistical proofs. Contrary to their assertion, respondent did not argue, and the trial court did not find, that the statistical disparities between the men's and women's salaries were due to differences in the quality of performance.[7] Although respondent argued, and the lower courts agreed, that the absence of quality and performance measures in petitioners' statistical analyses rendered them less probative, that was only one of many criticisms of petitioners' statistical studies. Apart from the absence of proxies for quality of performance, the biases in petitioners' proxies for objective qualifications and the methodological errors in their statistical studies had the demonstrated effect of creating an appearance of adverse treatment of women even in a wholly nondiscriminatory environment. (Pet. App. at 747-48).

Petitioners appear to argue that, as a matter of law, they must prevail unless respondent conducted studies which

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[7] Indeed, both parties' studies of salary increases during the relevant time period, the most obvious measure of qualitative evaluations, found no differences between the raises given male and female faculty. (Ex. 8186 at 32-34, Tables 47-58; Ex. 2782 at 9).

affirmatively showed *no* disparity. (Pet. at pp. 33-34, 38, 42). Petitioners' contention is not a correct statement of the well-settled law in this area. Plaintiffs in a Title VII case unquestionably bear the burden of persuasion throughout the case. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). A defendant may defeat a prima facie showing of a discriminatory pattern or practice by showing that the proof is inaccurate or incomplete. *Teamsters v. United States*, 431 U.S. 324, 360 (1977). Moreover, common sense as well as sound legal principles dictate that statistical evidence cannot carry a plaintiff's burden unless the trier of fact, applying correct legal standards, believes that the statistics describe the employment decisions at issue with a reasonable degree of accuracy. *Teamsters*, 421 U.S. at 340 (statistics' "usefulness depends on all of the surrounding facts and circumstances"). Here, where petitioners' evidence failed to achieve that degree of accuracy, the court was entitled to find that they had not carried their burden of persuasion.

Finally, petitioners take issue with the Ninth Circuit's omission of a defendant's burden of production in its description of the relevant burdens. (Pet. at p. 34). In context, the Ninth Circuit's statement is completely accurate. Where, as here, both parties have fully litigated the asserted claims, and the trial court reaches the ultimate question of whether plaintiffs have proven their claims of discrimination, then considerations about whether the parties met their intermediate burdens of production fall from the case. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983).[8] Furthermore, even if petitioners were correct, it would

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[8] Lower courts have been quick to follow this Court's lead and to recognize that, once all of the proofs are in and the case is submitted on its merits, it serves no useful purpose to try to dissect the evidence retrospectively and analyze it in terms of burdens of production rather than burdens of persuasion. Moreover, the utility of the *McDonnell Douglas-Burdine* model to

(Footnote continued on next page)

not advance their cause, because respondent fully met the burden they advocate. To hold that any assumed defect in an appellate court's articulation of the burdens is a fatal error where the record overwhelmingly shows that respondent satisfied its burden of production would be a towering triumph of form over substance. The Ninth Circuit committed no legal error relating to the parties' burdens, and petitioners' erroneous contention to the contrary does not warrant granting certiorari.

IV. Neither the Ninth Circuit Nor the District Court Held that Statistical Analyses of Less Than All Measurable Variables Could Not Prove Plaintiffs' Case.

Petitioners argued to the Ninth Circuit that the district court "required too much of their statistical proof," 816 F.2d at 465. The Ninth Circuit responded:

> We note that by finding fault and infirmities in the statistical evidence presented, the district judge was neither evading her responsibility to examine the evidence, nor placing impossible burdens on the plaintiffs. The judge was simply unpersuaded. . . .

Id. (footnote omitted). To this Court, petitioners argue that the Ninth Circuit erred by not recognizing that statistical analyses that omit some measurable variables might be probative of discrimination. (Pet. at 39-45).

This is a non-issue, created only by petitioners' mischaracterizations of the lower court's holdings. The trial

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(Footnote continued from previous page)

analyze the evidence in a complex class action is questionable. As colorfully observed by Judge Higginbotham, "[i]n a complex class action, utilizing statistical proof and counterproof, the value of the *Burdine* sequence—to highlight the issues in contest—is about as relevant as a minuet is to a thermonuclear battle." *Vuyanich v. Republic National Bank*, 521 F.Supp. 656, 661 (N.D. Tex. 1981), *vacated and remanded*, 723 F.2d 1195 (5th Cir. 1984), quoted with approval *Craik v. Minnesota State University Bd.*, 731 F.2d 465, 470 n. 7 (8th Cir. 1984).

judge did not rule that petitioners' statistics were unacceptable evidence of discrimination. (*E.g.*, Pet. App. at 713 ("The absence of any control for quality in plaintiffs' statistics is not of itself fatal, but is an obvious weakness . . ."); *id.* at 749 ("the flaws do not render plaintiffs' statistics wholly meaningless.")). Rather, after a painstaking and thorough review of respondent's criticisms of the statistics and the other evidence in the case, she found that the many flaws in petitioners' analyses created "the appearance of discriminatory treatment of women even though none may exist." (*Id.* at 745). Therefore, she concluded that petitioners' statistics were less probative than they might otherwise have been and less persuasive than respondent's analyses. The court's approach was, thus, wholly consistent with *Bazemore*'s admonitions that "failure to include variables will affect the analysis' probativeness, not its admissibility," ___ U.S. at ___, 106 S.Ct. at 3009 (footnote omitted), and that "[w]hether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant." *Id.*

The Ninth Circuit, in turn, recognized that petitioners' statistical proofs were admissible on the question of discrimination and that whether they were persuasive, given their flaws, was for the trial judge to gauge. 816 F.2d at 465. ("The district judge admitted statistical multiple regression evidence at trial and then chose to discount the weight of that evidence during her deliberations following trial.") The Ninth Circuit, thus, followed *Bazemore*'s holding with care, recognizing that flaws in statistical evidence generally go to weight, not admissibility, just as the district judge had concluded in her opinion.

V. The Lower Courts Did Not Deny Petitioners the Opportunity to Prove Pretext.

Petitioners assert that they had insufficient opportunity to prove that respondent's defenses were pretextual, because the district court excluded two expert witnesses and limited their time to present rebuttal evidence. The Ninth Circuit properly reviewed each of these actions for abuse of discretion. *See National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976) (dismissal of complaint for violation of discovery orders); Fed. R. Evid. 611(a) (mode and order of presenting evidence). Both parties briefed these issues extensively at trial and on appeal; the Ninth Circuit found no abuse of discretion. Neither issue presents a question of significance meriting this Court's extraordinary exercise of certiorari review. *See* Sup. Ct. R. 17. Nor do the facts of this case present any substantial doubt that the lower courts' rulings were correct.

The trial court's decision to exclude the two expert witnesses followed the court's special grant of a ten-day extension of the deadline to disclose experts' names, which petitioners failed to meet. Viewed in context, the sanction was reasonable. It was imposed only after it became clear that petitioners' counsel had withheld the experts' names for a considerable time after deciding to call them as witnesses, with the effect of depriving respondent of an adequate opportunity to prepare for cross-examination in a case where cross-examination of experts was both preparation-intensive and crucial. (*See* Motions and Orders at C.R. 643, 649, 651, 652, 668).

Petitioners' arguments concerning the court's restraints on rebuttal time omit two key facts. First, the trial judge expressly directed petitioners to introduce all their anecdotal rebuttal testimony by affidavit or deposition, subject to cross-

examination (C.R. 651, p.3), as she had required respondent to do for substantial portions of its case in chief.[9] (C.R. 603, p. 2). Petitioners introduced *no* affidavits or depositions to rebut respondent's explanations of the reasons for individual employment decisions challenged by plaintiffs and the anecdotal witnesses. Second, petitioners failed to exhaust all the time allotted for rebuttal. (*See* R.T. 22666).

As to both the exclusion of the witnesses and the limitations on rebuttal time, petitioners failed to preserve the issues with adequate offers of proof. Aside from bare assertions that the two experts are internationally famous and would have rebutted respondent's experts' testimony, petitioners have not argued that the *substance* of the expert testimony would have affected the outcome of the case. The trial court's order noted that petitioners could make the same points with other expert witnesses, and that the witnesses' reputations, as opposed to their testimony, would have little effect on the court's decision. (C.R. 668, p. 3). As to petitioners' rebuttal case, there simply is nothing in the record to suggest they had more rebuttal proofs to present.

VI. The Lower Courts Did Not Apply a More Lenient Title VII Standard to Academic Employers Than to other Employers.

Pay, promotion and tenure decisions in academic institutions necessarily entail subjective evaluations of such factors as the quality of teaching, scholarship and service, often in esoteric fields of study. Where, as here, the evaluative criteria and the weights ascribed to them vary from institution to institution and even among departments within a single institution, developing a valid statistical model to describe such decisions admittedly is a complex task, but not an impos-

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[9]The trial judge also limited respondent's time for presenting its case in chief and for rebutting petitioners' statistical studies on the revised class. (C.R. 603, p. 3; C.R. 638; C.R. 651, pp. 2-3).

sible one. The fact that petitioners assumed the difficult burden of proving intentional discrimination throughout a diverse, decentralized state-wide system of higher education and were unable to sustain their burden of persuasion does not justify an inference that the lower courts applied a different standard to academic employers.

This case simply does not present an issue of "deference" to subjective assessments in academia of the quality of teaching performance. All of the cases petitioners quote, and most of the cases they cite, involved individual claims of discrimination rather than complex class actions. The question of "academic deference" that petitioners assert troubles and confuses those courts is one that arises, if at all, when courts must test university administrators' explanations for specific employment decisions in individual cases (*e.g.*, that a professor is a poor researcher).[10] Petitioners confuse that issue with the question of what weight a trier of fact may or must give to complex statistical analyses, a question that does not involve issues of "academic deference" as discussed in the cases upon which petitioners rely.

In this case, the lower courts correctly recognized that the probative value of statistical analyses depends in part on the degree to which they model accurately the decision-making processes they purport to study. (Pet. App. at 689-97, 712-13, 769-70, 810-12); 816 F.2d at 464. *See generally Bazemore*, ___ U.S. ___, 106 S.Ct. at 3009; Stacy and Holland, *Legal and Statistical Problems in Litigating Sex Discrimination Claims in Higher Education*, 11 J. COLL. & U.L. 107, 147 (1984). As they conceded in their "rebuttal report," petitioners *intentionally* failed to model the processes under study, contending that

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[10] The trial judge's detailed examination of the twenty-two individual plaintiffs' claims, consuming 339 pages in her opinion, belies any contention that she treated the individual claims with an excessively deferential, hands-off approach.

subjective evaluation of faculty was illegitimate. (*See* Pet. App. at 708-09). That position cannot be sustained. Title VII prohibits discrimination; it does not authorize a court to substitute its judgment as to appropriate evaluative criteria, at least in the absence of proven discrimination.

At best, this case presents the question whether, as a matter of law, a trier of fact is obligated to infer discriminatory motive from statistics that were flawed in numerous respects and from anecdotal proofs that overwhelmingly failed to provide supporting real-life accounts of discriminatory treatment. That is not a question that troubles or confuses lower courts, nor is it a question that has never been addressed or resolved by this Court. *E.g.*, *Bazemore*, *supra*.

Petitioners' class claim did not fail because the courts deferred to academic judgment. It failed because petitioners' statistical analyses were flawed in numerous respects, because their nonstatistical proofs further undermined their class claims, and because respondent presented more persuasive evidence. Petitioners understandably seek to infer a legal error from their failure to convince the lower courts, but the inference is unwarranted. Petitioners chose to pursue sweeping allegations of system-wide discrimination; they simply failed to prove their claims.

VII. Summary.

Despite petitioners' efforts to make it appear otherwise, this case simply does not present the kind of special and important legal questions that merit this Court's review. Although the facts are extraordinarily complex and although both parties could argue at length about what the evidence can and (for the trier of fact) did show, that dispute hardly warrants appellate review at the national level. The Ninth Circuit's opinion does not conflict with decisions of other circuits; it does not announce new law; it does not present an opportunity for this Court to clarify an important area

of law that is confused or in disarray. Petitioners' assertions are non-issues. But even if they were not, they would be at most case-specific claims of error. The petition presents no issue of importance beyond the resolution of this case and it thus presents no basis upon which this Court should exercise certiorari review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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CLERK

No. 87-195

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ANNA PENK, ET AL, Petitioners,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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September 10, 1987

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STATEMENT OF THE CASE

Although generally criticizing the petitioners' Statement of the Case, respondent does not and cannot disagree that its own statistical evidence showed significant disparity between men and women faculty members, differing only in the size of the disparity. For example, in comparing faculty members of the same education, experience and discipline, the variables used by petitioners showed a statewide $2,000 annual salary disparity while the variables used by respondent, when aggregated statewide, showed a $700 annual salary disparity. Both are statistically significant (Pl. Ex. 2782, Table 2, p. 26; p. 132). Neither side, however, analyzed the variables claimed by respondent to be the major reason for the disparity - quality of teaching, scholarship, and service - because no

data was available.

REASONS FOR GRANTING THE WRIT

I. Introduction.

Briefs in this case reflect differing views of the role of this Court.

Respondent claims that certiorari should not be granted to correct an allegedly harmless error and therefore attempts to divert attention from the legal errors in the Ninth Circuit opinion and focuses instead on support in the record for the district court findings.

Petitioners, on the other hand, emphasize the importance of this Court clarifying and unifying what is required to prove discrimination. Petitioners claim that when a prominent court of appeals, in a major case involving 2000 class members, makes legal errors in

direct conflict with four major decisions of this Court, these errors will prejudice future litigants throughout the nation, long after the facts in the unreported district court opinion are forgotten.

II. Contrary to Respondent's contention, the Ninth Circuit's finding of uncorrected, proven historical disparity is the equivalent of historical discrimination.

The Ninth Circuit holds that, "There is no substantial dispute that historical disparity exists," 816 F.2d at 461, further, that "The statistics may have proved that there were disparities in salaries and other terms of employment..." 816 F.2d at 468. Also, there is no dispute that the women faculty were not brought into "parity" with the male faculty. 816 F.2d at 461.

Petitioners argue that the Ninth

Circuit findings equal in law a finding of "discrimination" whether or not that magic word is used in the opinion. Respondent fails to acknowledge that the discrimination here, as in Bazemore, is the continuing violation of failing to correct the proven historic disparity.

III. The Ninth Circuit's legal errors in allocating the burdens of producing evidence are not cured by Respondent's references to the factual record in the District Court.

Despite respondent's attempts to divert attention, the Ninth Circuit decision does say,

> "The only relevant burden in a class action disparate treatment case, assuming that plaintiffs can avoid Rule 41 dismissal, is upon plaintiffs to prove the existence of discriminatory intent." 816 F.2d at 461.

This statement contradicts four major decisions of this Court: Teamsters

v. U.S., 431 U.S. 324 (1977); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); and Bazemore v. Friday, 106 S. Ct. 3000 (1986), all of which place the burden of production of evidence upon defendant once a prima facie case is established.

Respondent tries to avoid the impact of this obvious legal error in two ways.

First, of all, respondent's brief argues that,

> "To hold that any assumed defect in an appellate court's articulation of the burdens is a fatal error where the record overwhelmingly shows that respondent satisfied its burden of production would be a towering triumph of form over substance." (Resp. Br. 11)

The issue before this Court is not what the trial court did or did not do in its unreported opinion, but the conflict

between the rules of law announced by the Ninth Circuit and the decisions of this Court.[1]

Respondent asks to focus on substance, and the substantial responsibility of this Court is to clarify and unify the law. The burden of production of evidence by Title VII defendants should be the same throughout the nation.

Secondly, respondent refers to the Ninth's Circuit's statement that an error in allocating the burden of producing evidence does not matter. The Ninth

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[1]The District Court was legally incorrect when it held that petitioners "could not prevail" without accounting for quality of teaching, scholarship, and service (Cr 716, pp. 379-380) and the Ninth Circuit was legally in error in affirming this district court error. It was respondent rather than petitioners that had the burden of production upon respondent's claimed major reason for the disparity.

Circuit says,

> "Indeed, by the time a fully-tried class action disparate treatment case reaches appeal, we need not consider whether the parties carried their respective burdens at the appropriate stages unless prejudicial errors, infecting distinct legal rulings prevented a fair trial." 816 F.2d at 46.

This statement attempts to establish an unique legal proposition denying any appellate review to a critical legal error of the District court. Both respondent and the Ninth Circuit cite United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983), but that case does not support their position. Aikens holds that the McDonnell-Burdine presumption drops from the case after defendant "responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection." (460 U.S. at 714-715)

(emphasis added). There is nothing in Aikens which takes away the fundamental right of all litigants in the American system of justice to have a circuit court review of claimed legal errors of a trial court.

IV. Contrary to Respondent's contention, the Ninth Circuit did erroneously hold that Plaintiffs could not prove their case without statistical analysis of all variables.

Once again, respondent seeks to focus this Court's attention on the district court's analysis of the facts rather than the Ninth Circuit's misstatement of the law. Respondent's brief does not mention that the Ninth Circuit required petitioners rather than respondent to account statistically for quality of teaching, scholarship, and service, (816 F.2d at 264-465) areas which are not statistically measurable

since no data on these variables exists in the Oregon state system. Moreover, there is no evidence in the record to indicate that women would appear to be inferior teachers, scholars, or colleagues if such data were available. This issue is not, as respondent would have this Court believe, a matter of the weight of the evidence. The Ninth Circuit's decision is a contradiction of Bazemore which holds that Title VII plaintiffs can prevail without accounting for all measurable variables.

V. The Ninth Circuit uses an erroneous legal standard in measuring Petitioner's opportunity to prove pretext.

Here also, respondent stresses the conflicting evidence that was available to the district court rather than seeking to defend what the Ninth Circuit said. For example, if, as the Ninth Circuit

holds, key experts were excluded due to a "misunderstanding" and this was only "technically" a violation of scheduling orders, then that is not a sufficient justification to prejudice the credibility of plaintiffs' statistical proof.[2] Recognizing that evidentiary errors in a civil case are rarely alone grounds for certiorari, the importance here is that the Ninth Circuit failed to provide petitioners a fair opportunity to prove pretext, as required by Burdine.

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[2]Contrary to respondent, the mistake was that plaintiffs' attorney memorialized his understanding of the deadline for filing the names of the rebuttal experts orally in open court, rather than by filing a pleading. (CR 604, 638, RT 19256, CR 643, CR 649, RT 21512-21515, CR 651, 652, 668)

VI. Contrary to Respondent's argument, unlawful judicial deference to subjective academic decision-making flawed the Ninth Circuit's decision in this case.

Respondent argues that academic deference can arise in individual cases, but not in class cases where the issue is usually resolved statistically (Resp. Br. 15). Here, the Ninth Circuit required petitioners to model statistically the quality of teaching, scholarship, and service, even though no data existed. As the majority opinion points out in Namenwirth v. Univ. of Wisconsin System, 769 F.2d 1235, 1245 (7th Cir. 1985), this means that in academia, "the decision-maker is also the source of the qualifications."

Such deference to academic decision-making makes it nearly impossible for academic plaintiffs to win, except, perhaps, where there are

procedural defects. Kluger, Sex Discrimination in the Tenure System of American Colleges & Universities: The Judicial Response, 15 J. Law & Educ. 319, 339 (1986). Moreover, this deference is contrary to the intent of Congress when it included higher education in the Civil Rights Act. H.R. Rep. No. 238, 92d Cong. 2d Sess. (1971), reprinted in (1972) U.S. Code Cong. & Admin. News 2137, 2155.

National importance is shown by a study which indicates that there were 6000 charges pending with the Equal Employment Commission (EEOC) against higher education institutions. See La Noue, The Federal Judiciary and Academic Personnel Policy, 10 Pol'y Stud. J. 105, 106 (1981). No other Title VII plaintiffs have a similar burden.

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CONCLUSION

The petition for the writ of certiorari should be granted:

1. This case is a statewide class action of nationwide importance, which is shown by the unusual request of three national organizations, as amicus curiae, that certiorari be granted.

2. Although higher education has been subject to Title VII of the Civil Rights Act since 1972, this Court has never defined how discrimination is to be proven in academia.

3. The Ninth Circuit has contradicted major decisions of this Court in holding: (a) that "historical disparity" can excuse bringing women into "parity," (b) that a Title VII defendant has no burden of providing evidence of the major claimed reason for a proven disparity; (c) that plaintiffs, in order

to prevail, must account for all variables; and, (d) that the decision-making of academic employers is entitled to special deference.

4. These rulings, unless reviewed and reversed, place a nearly impossible burden upon future Title VII plaintiffs generally, and upon academic plaintiffs in particular, throughout the nation.

Respectfully submitted,

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